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IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-185

MORTON P. ROME and MARJORIE T. ROME,
Trustees Under a Trust Agreement,

Petitioners,

v.

THYSSEN-BORNEMISZA EUROPE, N.Y., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Petitioners,

v.

THYSSEN-BORNEMISZA EUROPE, N.V., ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioners, Morton P. Rome and Marjorie T. Rome, trustees under a trust agreement made November 22, 1954, for the benefit of Sally P. Rome, respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit rendered in these proceedings on May 2, 1977.*

OPINIONS BELOW.

On November 16, 1976, the District Court issued a Memorandum Opinion approving as fair and reasonable the settlement of three actions ordered to be maintained as class actions, for purposes of settlement only (A1).[1]

* The Respondents are too numerous to be included in the caption. They are listed in the Order of the Court of Appeals printed in the Appendix, *infra*, to this petition (A50-51).

1. Citations herein to "(A—)" are to the Appendix, *infra*, to this petition. References to the Record in the Court of Appeals are made by the designations: "(Vol. I a)", "(Vol. II a)", or "(Vol. III a)". The Appendix has been segregated for convenience into Appendix A, B, and C.

The Memorandum Opinion of the District Court is reported at 424 F. Supp. 679. On November 18, 1976, the District Court entered a Judgment and Order that the actions shall proceed as class actions (A42). This Order is unreported. The Court of Appeals for the Second Circuit affirmed the Judgment of the District Court in an Order, dated May 2, 1977 (A50), which is unreported. The Court of Appeals did not write an opinion.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 2, 1977 (A50). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

In *Shaffer v. Heitner*, — U. S. —, 45 LW 4849 (June 24, 1977), this Court struck down a Delaware sequestration procedure which "coerces a defendant either to submit to personal jurisdiction in a forum which could not otherwise obtain such jurisdiction or to lose the securities which have been attached."

In this securities litigation, declared to be a class action *for settlement purposes only,* the courts below, utilizing the mandatory "opt-out" provisions of Rules 23(c)(2) and 23(c)(3) of the Federal Rules of Civil Procedure, coerced petitioners, convertible debenture holders who objected to the settlement, as absent, involuntary non-parties (but described as class members in the settlement), to submit to the personal jurisdiction of a forum which could not otherwise have obtained personal jurisdiction over them, or suffer, as a result of a "freeze-out" by short-form statutory merger, the loss of their common stock conversion

rights for a cash sum below the conversion price. If not vacated, the decision of the courts below is a serious threat to the entire national market for convertible debentures, because it opens the door to a method by which a practical destruction of the entire underlying basis for convertible debenture purchases may be effected.

The backdrop of this matter included a class action determination in which no specific findings were made to support the order, the representative designated in the settlement and order to represent petitioners' "class" was not one of its members, and his attorneys and the representatives for all classes named as such in the settlement and order had multiple and conflicting interests.

The questions presented are these:

1. Whether an order that three separate actions alleging federal securities and common law violations shall be maintained as class actions, for purposes of settlement only, was a fundamentally erroneous construction and application of Rule 23 of the Federal Rules of Civil Procedure violative of due process under the Fifth Amendment to non-parties described as plaintiff class members:

   (a) when entered without any specific findings of the existence of the prerequisites, standards, and criteria for class actions established by Rules 23(a) and 23(b); and

   (b) where the representative designated in the settlement and order to represent a convertible debenture owner class was not one of its members, and his attorneys and the designated representatives for all classes established by the settlement and order had multiple and conflicting interests.

2. Whether the application of Rules 23(c)(2) and 23(c)(3) of the Federal Rules of Civil Procedure to non-parties described as plaintiff class members violated their Fifth Amendment due process rights, to the extent that a judgment approving a settlement entered in class actions is made binding upon such non-parties who are not otherwise personally subject to the court's jurisdiction.

3. Whether the utilization of Rules 23(c)(2) and (3) of the Federal Rules of Civil Procedure in a class action can properly bind, by a judgment approving the settlement, objecting and silent non-parties described as plaintiff class members (convertible debenture owners whose rights to convert were substantially altered by the settlement), unless they act affirmatively to opt out, where such non-party convertible debenture owners had several contract rights pursuant to the terms of their debentures which provided that there would be no alteration or impairment of their rights to convert into common stock without their consent.

CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED.

This case involves the Fifth Amendment to the Constitution of the United States, the Rules Enabling Act, as amended, 28 U. S. C. § 2072, Section 259 of the Delaware General Corporation Law, Section 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j(b), Securities and Exchange Commission Rule 10b-5, 17 C. F. R. § 240.10b-5, and Rules 23, 65 and 82 of the Federal Rules of Civil Procedure, which are set forth herein at Appendix C, *infra*, pp. A53 through A63.

STATEMENT OF THE CASE.

In April, 1968, Indian Head Inc. ("Indian Head"), a diversified Delaware corporation, issued and sold publicly $25 million of its 5½ percent convertible debentures due April 15, 1993 ("Debentures"). The Debentures were listed and traded on the New York Stock Exchange. By the terms of the Debentures and the Indenture, each $1000 Debenture was convertible into 25.974 shares of Indian Head common stock, or a conversion price of $38.50 per share (Vol. II, 467a at 482a).

Beginning in October, 1973, Thyssen-Bornemisza Group, N.V. ("TBG"), (the name of which was later changed to Thyssen-Bornemisza Europe N.V.) ("TBE"), a Netherlands international and industrial holding company, began to acquire Indian Head common stock at $27 per share, in cash, through a tender offer and direct purchase from Indian Head. In August, 1974, Thyssen-Bornemisza, Inc. ("TBI"), a Maryland corporation organized originally as a wholly-owned sudsidiary of TBE to hold all securities of Indian Head, acquired additional shares of Indian Head common stock at $27 per share in cash through a second tender offer, bringing its holdings to over 90%. As a result, the Indian Head common stock and the Debentures were suspended from trading on the New York Stock Exchange on August 30, 1974 and delisted on September 24, 1974. Thereafter, the Debentures and common stock were traded only in the over-the-counter market.

On February 11, 1976, TBI, in a press release, announced plans to merge Indian Head into a newly formed wholly-owned subsidiary of TBI, to be known as Thyssen-Bornemisza Holdings, Inc. ("TBH"). Under this proposed plan of merger, the Debentures would be assumed by TBH. After the merger, however, the Debenture holders

would no longer have the right to convert their Debentures into common stock, but only might surrender them and receive $779.22 in cash for each $1000 of Debentures they held, or at the rate of $30 per share for 25.974 common shares.

Three purposed class actions [2] challenging various aspects of the Thyssen-Indian Head transactions were instituted in the Southern District of New York by holders and former holders of the Debentures, holders of Indian Head common stock, and holders of certain Indian Head warrants. These actions challenged the two tender offers and purchases of Indian Head securities on various grounds, including federal securities and common law violations, and sought both injunctive relief and damages.

On March 4, 1976, at the outset of a hearing on a request for injunctive relief to bar the merger plan announced by TBI in its press release of February 11, 1976, the defendants withdrew the merger proposal.

After withdrawal of the merger plan, counsel for defendants entered into settlement negotiations with counsel for plaintiffs in the three actions. By July 20, 1976, these negotiations resulted in a Stipulation and Agreement of Settlement ("Settlement Agreement") (Vol. I, 160a), encompassing two of the three actions.[3] On July 28, 1976, an amendment to the Settlement Agreement brought the third action within its scope (Vol. I, 186a).

Under the terms of the Settlement Agreement and its amendment, the parties agreed, subject to the approval of the court, that the three actions were to be maintained as class actions, but for purposes of settlement only. Various classes [4] of Indian Head present and former securities holders were defined and class representatives and lead counsel for all classes were designated, along with representatives and co-counsel for each class.[5]

The Settlement Agreement included a provision for consummation of a short-form statutory merger of Indian Head into TBH, the newly formed Delaware subsidiary of TBI. Under this merger, all publicly held common stock of Indian Head and rights to acquire Indian Head stock were to be eliminated, with TBH (whose name would then be changed to Indian Head), to be the sole remaining stockholder. Each public Indian Head common stockholder would be paid $32 in cash upon the merger. The Debenture Owner Class, of which petitioners were described members, would lose their rights to convert into Indian Head common stock after the merger, but a Debenture owner could (i) surrender his Debentures after the merger and receive $844.16 in cash for each $1000 Debenture (or at the rate of $32.50 for the 25.974 common shares into which the Debenture was otherwise convertible, although the original conversion price was $38.50); (ii) retain his Debentures until maturity on April 15, 1993; (iii) surrender his Debentures at any time after the merger but prior to maturity in exchange for $831.17 in cash (or at the rate of $32 per share for the 25.974 common shares); or (iv) convert his Debentures into common stock prior to the merger and seek appraisal under Delaware law.

Subject to the court's approval of the settlement and merger, TBI agreed it would pay into a Fee Fund the

2. *Brucker, et al. v. Thyssen-Bornemisza Europe, N.V., et al.*, 74 Civ. 5755, filed December 31, 1974; *Weinberger v. Powers, et al.*, 75 Civ. 229, filed January 16, 1975; and *Shamrock Corp., et al. v. Indian Head Inc., et al.*, 75 Civ. 1736, filed April 9, 1975 (Vol. III, 750a, 754a, 757a).

3. The *Brucker* and *Weinberger* actions, *supra*, n. 2.

4. The classes established were: Common Stock; Debenture Owners; Debenture Sellers A & B; Warrant Owners; and Warrant Sellers A & B.

5. Lead counsel for all classes was sole counsel for the Common Stock Class.

amount of awards by the court for the fees and expenses of plaintiffs' attorneys and experts, not in excess of $600,000.

Finally, the Settlement Agreement provided that all actions, wherever and by whomever brought, arising out of or relating to the subject matter of the three class actions being settled, were to be stayed and enjoined, in any court other than the court before which the three class actions were pending, until entry of a judgment and order determining whether the proposed settlement was fair, reasonable and adequate. In addition, if the settlement was subsequently approved, all class members were to be permanently enjoined from prosecuting any claims arising out of or relating to the matters set forth in the complaints of the three actions.

On August 2, 1976, the District Court entered an Order which included, with the exception of the permanent injunction provision, all of the terms of the Settlement Agreement described above and was substantially identical to the form of Order submitted by the settling parties (Vol. I, 148a). The Order directed that the three actions were to be maintained as class actions for purposes of settlement only, and designated the class representatives, lead counsel and co-counsel for each of the classes previously selected by the parties.

The class action determination order was entered even though it was clear from the record that certain of the class representatives were not members of the classes they were designated to represent, and there existed multiple and conflicting interests of the named representatives and their attorneys.

For example, the individuals designated to represent all classes were only members of the Debenture Owner Class, one of the 7 classes. The individual designated to

represent the Debenture Owner Class (of which petitioners were described members), was not a member of that class and not a member of the Debenture Seller Class A, although he was named to represent the Debenture Owner Class and the Debenture Seller Classes A and B. (--As a member of the Debenture Seller Class B this "representative" had claimed a loss of $213.43 in his class suit (Vol. III, 754a at 755a, 06-04-75).—) The representative designated for the Common Stock Class had in fact only been added as a named plaintiff in a second amended complaint, filed with the consent of the defendants by the attorneys who had been designated in the Settlement Agreement as lead counsel for all classes, *six days* after the settlement bargain of July 20, 1976 had been struck on behalf of the class he was named to represent (Vol. I, 84a).

The lead counsel designated for all classes had originally represented only Debenture owners (Vol. I, 7a). After the settlement agreement of July 20, 1976, in the second amended complaint consented to by defendants and filed July 26, 1976, added plaintiffs who were common stock holders and warrant owners were then represented by this lead counsel (Vol. I, 84a). Before becoming lead counsel for all classes, these attorneys had not previously represented the Debenture Seller Classes A and B or the Warrant Seller Classes A and B.

The firm designated as co-counsel for the Debenture Owner Classes and the Debenture Seller Classes A and B had not previously represented any members of the Debenture Owner Class or Debenture Seller Class A, but only the representative of the Debenture Seller Class B who had claimed a loss of $213.43 in his class suit.

The District Court Order also directed that notice of the proposed settlement and the hearing thereon be given to all identifiable class members. Pursuant to this provi-

sion of the Order, petitioners, as holders of $25,000 of Debentures, were mailed and received notice of the settlement hearing. Although petitioners were residents of the Eastern District of Pennsylvania and not personally subject to the jurisdiction of the United States District Court for the Southern District of New York, the notice commanded them either to opt out of the Debenture Owner Class, in accordance with the provisions of Rule 23(c)(2) and the procedures established by the August 2 Order, or be bound by the adjudication of the United States District Court for the Southern District of New York (Vol. III, 579a at 582a). The notice to petitioners and other described class members omitted to disclose the facts set forth above concerning the positions of the class representatives and their attorneys, and, indeed, did not even name the class representatives.

Under the terms of the notice, petitioners, if they requested exclusion, would not share in the benefits of the settlement, would not be bound by any judgment entered in the matter, and would only be able to pursue their individual claims, if any. If petitioners failed to submit a request for exclusion the result would be, according to the notice, that as a class member they would be bound by the terms of any judgment or order in the matter, including a judgment and order approving the proposed settlement. If petitioners objected to the proposed settlement they were invited to appear at the settlement hearing and show cause why the proposed settlement should not be approved and the action dismissed[6] (Vol. III, 579a at 582a and 586a).

6. The stay and injunction against prosecution of any suits by any person, arising out of or relating to the subject matter of any of the pleadings in the actions being settled, the terms of the Settlement Agreement or the merger, in any court other than the Southern District Court, pending entry of a judgment and order approving the settlement and merger, although set forth in the Settlement Agreement and the District Court's Order of August 2,

Because petitioners concluded that these courses effectively confronted them with a Hobson's choice, they filed a notice of intention to appear and set forth various grounds for their objections to approval of the proposed settlement and merger (Vol. I, 193a). Petitioners did not seek to intervene or become parties. After hearing (Vol. I, 207a, Vol. II, 267a) the District Court rejected all of petitioners' contentions, filed its Memorandum Opinion that the settlement was fair and reasonable, and approved the merger contemplated therein (A1). Judgment and Order was then entered that the three actions shall proceed as class actions on behalf of all members of each of the seven classes who had not theretofore requested exclusion (A42).

Before receipt of the District Court's Memorandum Opinion, petitioners, to comply with the injunction contained in the August 2, 1976 Order (Vol. I, 148a at 156a-157a) despite its questionable effect under Rule 65(b) of the Federal Rules, along with another owner of Debentures who had requested exclusion from the settlement, filed on November 16, 1976 in the United States District Court for the Southern District of New York, 76 Civ. 5129, a separate class action complaint on behalf of themselves and representatively on behalf of all other owners of Debentures who had not affirmatively consented to the settlement, seeking primarily therein injunctive and declaratory relief. This independent suit asserted some claims arising out of or relating to the matters set forth in the complaint of the settled actions (Vol. II, 402a at 407a).

The scope of the District Court's permanent injunction included unidentified but described "class members".

6. (Cont'd.)
1976 (Vol. I, 148a) did *not* appear in the Notice of Hearing on the settlement. Nor did the proposed permanent injunction against any suits by all class members, in the event of court approval of the settlement, appear in the Notice of Hearing on the settlement (Vol. III, 579a).

As a result this separate class action suit of petitioners could possibly be proscribed by the terms of the injunction, although petitioners were not parties to the actions settled, but, as was their right, pursuant to the invitation in the notice simply had objected and contested at the hearing on the settlement the legality of the compromise as it affected them and other owners of Debentures who had not affirmatively consented to the settlement. In an effort to effect dissolution of this permanent injunction issued in the District Court Judgment and Order (A42 at A48-49), petitioners timely filed a Motion to Alter or Amend Judgment, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure (Vol. II, 402a). Petitioners also filed an Application for Partial Stay of Judgment and Order Pending Appeal (Vol. II, 413a), and Motion for an Order Clarifying and Supplementing the Record (Vol. II, 427a). These motions and application were denied by the District Court on November 29, 1976 (Vol. II, 412a, 426a, 433a), on which date petitioners filed a notice of appeal to the Second Circuit from the Judgment and Order entered November 18, 1976 (Vol. II, 465a).

Petitioners' challenge of the settlement by appeal was rejected by a panel of the Second Circuit on May 2, 1977, which affirmed the judgment of the District Court (A50).

REASONS WHY WRIT SHOULD BE GRANTED.

I. This Court Should Resolve the Split of Authority Existing Among the Courts of Appeals on Whether Specific Findings in Support of a Class Action Determination Order Are Required to Be Made by a Court. This Is Particularly Vital Where Actions Are Ordered to Be Maintained as Class Actions for Purposes of Settlement Only Involving Issues Concerning Adequacy of Representation and Conflicting Interests of the Representative Parties.

Although it appears that the draftsmen of amended Rule 23 of the Federal Rules of Civil Procedure contemplated requiring the court to make specific findings in support of a class action determination order both in the language of the Rule, and in the notes,[7] there is a conflict among the Courts of Appeals on the necessity for making such specific findings.

In *Price v. Lucky Stores, Inc.*, 501 F. 2d 1177 (9th Cir. 1974), the court held that Rule 23 implicitly required the District Court to make specific findings on the questions of whether those provisions had been satisfied and properly applied. In the absence of such findings, it was held that reversal and remand was required. This holding of *Price* was followed in *Nguyen Da Yen v. Kissinger*, 70 F. R. D. 656, 661 (N. D. Cal. 1976), where the Court stated:

> "In determining whether a matter should proceed as a class action the Court is required to make findings

7. Fed. R. Civ. P. 23(b)(3); *Advisory Committee Note*, 39 F. R. D. 98, 103 (1966); See also Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 Harv. L. Rev. 356, 390 (1967).

concerning each essential element of the class action rule."

The commentary expressed in 3B Moore's Federal Practice, ¶ 23.45 [1], p. 23-707 (1977) is consistent with that of the 9th Circuit.

On the other hand, despite the widespread growth in the use of the class action device, "so instinct with benefits, (but) also fraught with mischievous effects", *Morris v. Burchard,* 51 F. R. D. 530, 536 (S. D. N. Y. 1971), the Third Circuit, like the Second, is of the view that the language in Rule 23 relating to findings" . . . refers merely to the preliminary determination the court must make before deciding the class action issue and does not require an express, objective articulation of those determinations." *Interpace Corporation v. City of Philadelphia,* 438 F. 2d 401, 404 (3d Cir. 1971).[8] In *Eisen v. Carlisle & Jacquelin,* 52 F. R. D. 253 (S. D. N. Y. 1971),[9] the Court made extensive findings of fact in determining that the suit was maintainable as a class action. However, relying on *Interpace,* it noted that its findings were not a "necessary procedure" in every class action determination. 52 F. R. D. at 256, n. 1.

In the present case, the District Court, in entering the August 2, 1976 Order that the actions agreed to be settled shall be maintained as class actions, made no findings with respect to the criteria and standards set forth in Rules

8. But see the observation in the majority opinion in *Interpace, supra,* 438 F. 2d at 404, in which it was conceded to be "a salutary practice", where conflicting positions are given to the District Court in connection with the class action determination, for there to be "at least a minimum articulation of the reasons for its decision." *Cf.* the dissent of Judge Adams in *Interpace, supra,* 438 F. 2d at 404-407.

9. *Rev'd on other grounds,* 479 F. 2d 1005 (2d Cir. 1973), *remanded with instructions to dismiss the class action as so defined,* 417 U. S. 156 (1974).

23 (a) and (b). The District Court merely accepted the Settlement Agreement arrived at by the parties to the actions and defined the classes and designated certain representatives of each class, just as set forth in the Settlement Agreement (Vol. I, 148a).

In the Memorandum Opinion approving the terms of the settlement, the basis for the District Court's rejection of petitioners' objections as to the inadequacy of representation of the Debenture Owner Class was grounded on the view that the settlement did not abridge petitioners' substantive rights (A1 at A17). This conclusion was reached despite the fact that the failure of any one of the requirements of Rule 23 destroys the alleged class action. *Eisen v. Carlisle & Jacquelin,* 391 F. 2d 555, 561 (2d Cir. 1968); *Rutledge v. Electric Hose & Rubber Company,* 511 F. 2d 668, 673 (9th Cir. 1975).

Accordingly, the disposition by the District Court of petitioners' objections concerning inadequacy of representation makes evident the dangers of error and abuse that are encountered where there is a lack of specific finding by the District Court concerning each essential element of the class action rule.

By affirming the judgment of the District Court, despite petitioners' square attack on the adequacy of representation and the presence of multiple and conflicting interests of the representative parties and their attorneys, the Court of Appeals approved this practice. The parties to the settlement were thus allowed "to secure the benefit of a class action without first satisfying the requirements for it." *Eisen, supra,* 417 U. S. at 177.

Although "Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided", *Eisen, supra,* 417 U. S. at 176, the District Court's Opinion, adopted by the Court of Appeals, erroneously

treated a finding that "no substantive rights of debenture holders are abridged by the settlement" (A1 at A17) as dispositive of the issues of inadequacy of representation and multiple and conflicting interests.

It is well-settled that to be maintainable as a class action a suit must meet all the requirements of Rule 23(a) and also fall within one of the subsections of 23(b). *Eisen v. Carlisle & Jacquelin, supra,* 391 F. 2d at 561 (*Eisen II*); *West Virginia v. Chas. Pfizer & Co.,* 440 F. 2d 1079, 1089 (2d Cir. 1971), *cert. denied,* 404 U. S. 871 (1971).

Although a Court must consider each of the criteria set forth in Rules 23(a) and (b), since the 1966 revision particularly careful scrutiny must now be given to Rule 23(a)(4). *Eisen II, supra,* 391 F. 2d at 562; *Gonzales v. Cassidy,* 474 F. 2d 67, 74-75 (5th Cir. 1973); *see Hansberry v. Lee,* 311 U. S. 32, 44 (1940); *Kentucky Home Mut. Life Ins. Co. v. Duling,* 190 F. 2d 797, 802 (6th Cir. 1951).

Implicit in the requirements of Rule 23(a)(4) is that the party seeking to represent the class must himself be a member of that class. The rationale for this requirement is that it is unlikely that a non-member of the class will adequately defend the interests of the class. 7 Wright & Miller, *Federal Practice & Procedure,* § 1761 at 585 (1972).

This Court has continually held that a litigant must be a member of the class which he seeks to represent at the time the class action is certified by the District Court. Otherwise, he lacks standing to assert the rights of class members. *East Texas Motor Freight System, Inc. v. Rodriguez,* — U. S. —, 45 LW 4524 (May 31, 1977); *Kremens v. Bartley,* — U. S. —, 45 LW 4451, 4454, n. 12 (May 16, 1977); *Sosna v. Iowa,* 419 U. S. 393, 403 (1975); *Schlesinger v. Reservists Committee to Stop the War,* 418 U. S. 208, 216 (1974); *Rosario v. Rockefeller,* 410 U. S. 752, 759, n. 9 (1973); *Hall v. Beals,* 396 U. S. 45, 49 (1969); *Bailey v. Patterson,* 369 U. S. 31, 32-33 (1962).

Implicit also, if not in reality explicit, in the requirements of Rule 23(a)(4) is that a representative cannot have interests which might be antagonistic to other members of that class. Such antagonism may arise as a result of differences over economic interests or individual predilections. The principal relief sought must not be repugnant to the interests of class members. If the relief or new status accruing to class members as a consequence of the representative's actions is not in the interests of class members, that, too, constitutes noncompliance with Rule 23(a)(4).

Petitioners' rights to due process were clearly impaired by the District Court's refusal to adhere to the criteria set forth in Rules 23(a) and (b), and in particular Rule 23(a)(4). In its Opinion, the District Court concluded that because it believed the settlement was fair and reasonable, any objections that went to the propriety of the maintenance of a class action could be rejected. Petitioners' contentions were thus disposed of in a fashion which allowed the ends to justify the means.

This case clearly presents an appropriate vehicle for the Court to enunciate a uniform and salutary standard that every class action determination must be supported by specific findings of fact and conclusions of law, which articulate the reasons for such decision and how each of the criteria specified by Rules 23(a) and 23(b) have been met.

In addition, to curb the potential abuses inherent in class actions agreed to be maintained by parties for purposes of settlement only, thereby preventing the sacrifice of procedural and substantive fairness, this Court should mandate that the practice of determining that actions shall

be maintained as class actions "for purposes of settlement only", *after* the terms of a settlement had already been bargained with defendants by plaintiffs, as undesignated "class representatives", and their counsel, is not merely condemned, but permanently outlawed. *Cf. Manual for Complex Litigation* (1975) Part I, § 1.40, p. 25 and § 1.46, pp. 55-58; *City of Detroit v. Grinnell Corporation*, 495 F. 2d 448, 466 (2d Cir. 1974); Memorandum Opinion of the District Court, dated November 16, 1976 (A1).

In class actions there is and can be no substitute for fair and adequate representation, and specific findings should articulate this. Just as this Court recently, in *Kremens v. Bartley, supra*, 45 LW at 4455, thought it not amiss to remind a district court that it is under obligation "to 'stop, look and listen' before certifying a class in order to adjudicate constitutional claims," granting the writ sought by petitioners will serve as a similar admonition of the gravity involved in complying with the requirements of Rule 23(a) before certifying class actions.

II. The Validity of Rules 23(c)(2) and 23(c)(3) in Compelling Non-Parties Described as Plaintiff Class Members to Perform the Affirmative Act of Opting Out or Be Bound by the Adjudication of a Court Which Lacks Personal Jurisdiction Over Them Presents a Significant Question of Federal Law and Juridical Administration Which Should Be Decided by This Court.

By their express terms, Rules 23(c)(2) and 23(c)(3) make a judgment entered in a class action binding on all non-party class members except those individuals who take affirmative action and opt out of the class in accordance with the provisions of Rule 23(c)(2)(A) and the specific procedures established by the court in a particular case.

Petitioners contend that these provisions founded solely upon a rule of court, which forces non-parties described as class members not otherwise personally subject to a court's jurisdiction to perform the affirmative act of opting out or be bound by the adjudication of a court which lacks personal jurisdiction over them, is unconstitutional because it deprives such non-parties of due process guaranteed by the Fifth Amendment. Rule 82 of the Federal Rules of Civil Procedure also prohibits the construction of the rules to extend the jurisdiction of the district courts.

Although this Court has often considered the jurisdictional due process claims of non-residents defendants, *see, e.g., Shaffer v. Heitner, supra*, 45 LW 4849 (June 24, 1977); *McGee v. International Life Insurance Company*, 355 U. S. 220 (1957); *International Shoe Co. v. Washington*, 326 U. S. 310 (1945), neither it nor the lower federal courts have ever delineated the due process limitation on a federal court's personal jurisdiction over an individual or entity in the position of an involuntary non-party plaintiff as a result of being a described member of a class in an action ordered to be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure.

Somewhat over ten years ago, the District Court in *School District of Philadelphia v. Harper & Row Publishers, Inc.*, 267 F. Supp. 1001, 1005 (E. D. Pa. 1967), expressed the following comment on the amended scope of Rule 23:

> "Although the new rule gives us no express power to order a proposed member to join the class—if a proposed member, over whom we previously had no personal jurisdiction, simply ignores the notice, whether by intention or by inadvertence, it becomes, by inaction alone, a member of the class to be bound by the judgment. Our 'invitation', thus extended, becomes, in effect, a 'command'. Such a radical exten-

sion by (*sic* of) this Court's jurisdiction by the mere inaction of a non-appearing, non-resident citizen is, in our view, unprecedented."[14]

By its silence, a proposed class member not only forfeits its previously unfettered right to choose its own forum and to initiate its own litigation, but apparently waives any objections it might have concerning the lack of personal jurisdiction and venue of this Court.

We have some doubt, too, of the propriety of a rule which extends the binding, substantive effect of a judgment to absent, but 'described', class members as well as to 'identified' class members."

In footnote 14 (267 F. Supp. at 1005), the court stated:

"Previously, any enlargement of the jurisdiction and venue powers of the district courts by Congress has been specifically conferred by statute. The Interpleader Statutes 28 U. S. C. §§ 1335, 2361 and the recent Habeas Corpus Amendment to 28 U. S. C. § 2441 are but several examples."

There is a body of case law bearing on this question now raised which casts serious doubt on the validity of the "opt-out" provisions of Rules 23(c)(2) and 23(c)(3) to the extent that they are made applicable to involuntary non-parties described as plaintiff class members over whom the court previously had no jurisdiction.

Traditionally, a court's personal jurisdiction has attached to a plaintiff, resident or non-resident, only when the plaintiff voluntarily submits his claim for adjudication.

Beginning with *International Shoe, supra,* a case involving a corporation, this Court has consistently adhered

to the rule that a state court may not exercise personal jurisdiction over a defendant unless that defendant has had:

". . . [c]ertain minimum contacts with [the] forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." 326 U. S. at 316.

The same rule was followed in *McGee v. International Insurance Company, supra,* 355 U. S. at 222.

The rule of *International Shoe* was extended to individual defendants in *Hanson v. Denckla,* 357 U. S. 235 (1958). After specifically noting ". . . [t]here is no suggestion that the court failed to employ a means of notice reasonably calculated to inform non-resident defendants of the pending proceeding, or denied them an opportunity to be heard . . ." (357 U. S. at 245) the Court held:

". . . [The restrictions on the personal jurisdiction of state courts] are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him." 357 U. S. at 251. [Citation omitted.]

International Shoe, McGee and *Hanson* all dealt with the power of state courts under the Fourteenth Amendment.

The lower federal courts have consistently held that the personal jurisdiction of district courts is limited in the same manner and to the same extent by the due process

clause of the Fifth Amendment. The holdings in these cases are summarized by the Seventh Circuit in *Honeywell, Inc. v. Metz Apparatewerke*, 509 F. 2d 1137 (7th Cir. 1975). After acknowledging that the Supreme Court cases on "minimum contacts" all related to the jurisdiction of state courts under the Fourteenth Amendment, the *Honeywell* Court held:

> ". . . In this litigation, on the other hand, a federally created right is at issue, and due process is properly a matter for examination in light of the Fifth Amendment rather than the Fourteenth Amendment.
>
> That is not to say, however, that the International Shoe line of cases is irrelevant to our inquiry here. The due process clause of the Fifth Amendment is essentially a recognition of the principles of justice and fundamental fairness in a given set of circumstances, Galvan v. Press, 347 U. S. 522, 530, 74 S. Ct. 737, 98 L. Ed. 911 (1954); Aetna Insurance Company v. Hartshorn, 477 F. 2d 97, 100 (5th Cir. 1973), and, so viewed, on the facts of this case, we can perceive no operative difference between the concept of due process as applied to the states and as applied to the federal government. This and other courts have reached this result, explicitly or tacitly, and have applied the 'minimum contacts' standard to fedaral question cases in which in personam jurisdiction was at issue, and we deem it appropriate to do so here. . . ." 509 F. 2d at 1143. [Footnote and citations omitted.]

Under the line of cases represented by *Honeywell*, the due process clause of the Fifth Amendment prohibits a non-resident defendant from being compelled to adjudicate his rights in a district court in an action arising under federal law unless he has had "minimum contacts" with the forum.

Most recently, this Court in *Shaffer v. Heitner, supra*, 45 LW 4849 (June 24, 1977), declared the State of Delaware's assertion of jurisdiction over non-residents by a sequestration order, based solely on the statutory presence of securities in Delaware, was violative of due process, because that clause "does not contemplate that a state may make binding a judgment . . . against an individual or corporate defendant with which the state has no contacts, or relations." *International Shoe, supra*, 326 U. S. at 319. By acquiring securities of a Delaware corporation, this Court held that the defendants did not "surrender their right to be brought to judgment only in states with which they had 'minimum contacts'." *Id.*, 45 LW at 4857.

Mr. Justice Stevens, concurring in the judgment, noted:

> "One who purchases shares of stock on the open market can hardly be expected to know that he has thereby become subject to suit in a forum remote from his residence and unrelated to the transaction." *Id.*, 45 LW at 4858.

The compulsion of Rules 23(c)(2) and (3) on non-parties described as plaintiff class members, who had purchased convertible debentures on the open market, to perform the affirmative act of opting out or be bound in a class action settlement by the adjudication of a court which lacks personal jurisdiction over them, is quite analogous to the impermissible "surrender" of rights held by this Court to be inconsistent with due process in the *Shaffer* case, and, it is contended, equally impermissible constitutionally.

This compulsion of Rule 23 can also not be justified on the basis of the minimal effort normally required to "opt out" of a class. *Hanson v. Denckla, supra*, clearly holds that no burden, no matter how minimal, can be constitutionally imposed by a state court which lacks a constitutional basis for asserting personal jurisdiction over a

citizen. Based on *Honeywell, supra,* and the decisions consistent with it, the same rule should be equally applicable to district courts to strike down the coercive effect of Rules 23(c)(2) and 23(c)(3) on objecting non-parties who are described as plaintiff class members.

In addition to this contended inconsistency with the Fifth Amendment, petitioners also submit that the effect of Rules 23(c)(2) and 23(c)(3) represents an invalid expansion of the personal jurisdiction of district courts, contrary to the express provisions of the Rules Enabling Act and Rule 82. To the extent this Court's decisions in *Mississippi Pub. Corporation v. Murphree,* 326 U. S. 438 (1946), and *Snyder v. Harris,* 394 U. S. 332 (1969), appear to have language contrary to these contentions concerning the Rules Enabling Act and Rule 82, those expressions should be reconsidered and declared inapplicable to the present context. There is nothing in the Rules Enabling Act or Rule 82 or their respective histories which indicates that their proscriptions should be construed as being solely limited to subject matter jurisdiction. Facially, both the statute and the rule appear equally applicable to personal jurisdiction and both appear to prohibit expansion of that jurisdiction as is purported to be accomplished by Rule 23.

III. The Class Action Settlement Approved by the Courts Below Misused the "Opt Out" Provisions of Rule 23 to Foreclose the Rights of Objecting and Silent Convertible Debenture Owners Who by Their Debenture Contracts Were Not Required Affirmatively to Request Exclusion to Protect Against Loss of Their Rights to Convert Into Common Stock. If Not Vacated, This Decision Will Be A Serious Threat to the Entire National Market for Convertible Debentures.

Since adoption in 1966 of amended Rule 23, there has been a running controversy on the "opt out" requirements adopted in Rule 23, in contrast to "opt in." Compare Report of the Commission on Federal Courts of the Association of the Bar of the City of New York, *Class Actions—Recommendations Regarding Absent Class Members and Proposed Opt-In Requirements,* 25 Record of N. Y. C. B. A. 897 (1973), with the Report and Recommendations of the American College of Trial Lawyers Special Committee on Rule 23, pp. 31-34 (March 15, 1972).[10]

Stated in the terms of the Debentures involved in this litigation, each of which is deemed to be a contract made under and for all purposes to be construed in accordance with the laws of the State of New York, as provided in Sec. 16.09 of the Indenture pursuant to which these Debentures were issued (Vol. II, 467a at 576a), is the provision that:

> ". . . no . . . supplemental indenture shall . . . alter or impair the right to convert the same into shares of common stock at the rates and upon the terms provided in the Indenture without the consent of the holder of each Debenture so affected . . ." (Vol. II, 467a at 483a-484a).

Petitioners' contentions in the courts below included the position that their Debenture contract prevented the alteration or impairment of their separate and several contracts rights to convert into common stock, without the individual written consent of each holder. Therefore the class action settlement could only bind those holders who affirmatively opted in and could not bind those who did not respond. As a result in the event of a merger, the Debenture owners could not be forced to accept the

10. These reports appear in *Current Problems in Federal Civil Practice,* (P. L. I. 1975) pp. 461-521.

altered right to convert into money, instead of common stock. Of course, because the Debentures were redeemable, Indian Head or any successor could redeem the Debentures. The District Court, however, interpreted the Debenture contract and the Indenture as authorizing such conversion alteration in the event of a merger (A1 at A15-17).

The construction and interpretation of the nature of the contract rights created by the Debentures is governed by state law, that of New York, as specified in the Indenture. The creditors of a corporation (the Debentures having creditor status), merged under the laws of Delaware, become creditors of the corporation into which it has been merged, with all rights unimpaired, and all liabilities and duties of the merged constituent corporation become attached to the surviving or resulting corporation. Sec. 259, Delaware General Corporation Law (A55). In addition, this section of the Delaware statute provides that such liabilities and obligations may be enforced against the surviving or resulting corporation to the same extent as if the liabilities have been incurred or contracted by the surviving or resulting corporation. Thus, the creditors of a merged constituent corporation under Delaware law are automatically protected. See Folk, *The Delaware General Corporation Law—A Commentary and Analysis* (Little, Brown, 1972) Section 259/365-368.

In *Santa Fe Industries, Inc. v. Green*, — U. S. —, 45 LW 4317 (March 23, 1977), this Court held that in a short-form statutory merger under Delaware law, the policies and interests of the state forum are paramount, and an expansion by federal judicial construction making Sec. 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 applicable is impermissible.

Therefore, petitioners contend, the settlement and consummation of the merger with its concomitant destruction of the rights to convert into common stock infringed the Delaware statutory provision contained in Sec. 259 of its General Corporation Law. All the substantive state-created rights of the Debenture owners were not preserved unimpaired. See *Van Gemert v. The Boeing Co.*, 520 F. 2d 1373, 1382, n. 19 (2d Cir. 1975), *cert. denied*, 423 U. S. 949 (1975); *Kusner v. First Pennsylvania Corporation*, 531 F. 2d 1234, 1238 (3d Cir. 1976).

The class action settlement procedure approved by the courts below perverted and misused the "opt out" provisions of Rules 23(c)(2) and 23(c)(3) to foreclose the rights of objecting and silent Debenture owners who by their Debenture contracts were not required affirmatively to request exclusion to protect against loss of their rights to convert into common stock.

Petitioners contend that by the nature of their contract, as well as by their not having been previously subject to the personal jurisdiction of the Court, they had the right to be let alone, and the right to remain unclassified, in the absence of some voluntary expression of choice. See M. Frankel, *Amended Rule 23 From a Judge's Point of View*, 32 A. B. A. Antitrust L. J. 295, 300 (1966).

As a further device to effect the foreclosure of rights of objecting and silent debenture owners, the court-approved settlement and merger authorized the issuance, as part of the judgment (A42 at A48-49), of a permanent injunction against all class members from prosecuting any claims arising out of or relating to the matters set forth in the complaints of the settled actions, including any claim related to consummation of the merger, other than a proceeding for appraisal under Delaware law.

This permanent injunction was issued without prior adequate notice, and without a trial on the merits, although a permanent injunction can properly be issued only after a

right thereto has been established at a trial on the merits. 11 Wright and Miller, *Federal Practice and Procedure,* § 2941 at 361 (1973); *Capital City Gas Company v. Phillips Petroleum Company,* 373 F. 2d 128, 131 (2d Cir. 1967). Yet the hearing on approval of the class action settlement and merger was not a trial on the merits. *City of Detroit v. Grinnell Corporation, supra,* 495 F. 2d at 456; *Saylor v. Lindsley,* 456 F. 2d 896, 904 (2d Cir. 1972). In addition, at the hearing on the settlement, no evidence was introduced by the proponents of the compromise to establish lack of adequacy of another remedy or any irreparable loss or damage necessary to support the grant of this permanent injunction. 7 *Moore's Federal Practice* ¶ 65.18[3] at 65-135-136 (1975). This permanent injunction made a nullity of the provision in the Indenture pursuant to which the Debentures were issued, which specifically provided in Sec. 8.09:

> "Anything in this Indenture to the contrary notwithstanding, the holder of any Debenture without reference to or the consent of either the Trustee or the holder of any other Debenture, in his own behalf and for his own benefit, may enforce, and may institute and maintain any proceedings suitable to enforce, his right to convert his Debenture into shares of Common Stock as provided in Article Five." (Vol. II, 467a at 537a)

The ultimate effect of the judgment and order of the courts below, if not vacated, threatens to open the door to and enable the forced elimination and destruction of the right to convert into common stock of literally billions of dollars of outstanding convertible debentures in the United States.

Issuers and their controlling persons, through the device of a statutory merger without the consent of con-

vertible debenture owners, utilizing the mechanism of settlement under Rule 23, with its "opt out" provisions contained in Rules 23(c)(2) and 23(c)(3), can achieve this result at discount prices below the face amount of the debentures. The device utilized and approved by the decisions below works a practical destruction of the underlying basis for convertible debenture purchases. If this misuse of Rule 23, by the route of settlement and statutory merger, is not vacated, the future underwriting and issuance of convertible debentures in the capital markets of the country by issuers whose common stock is expected to rise, may well, for all practical purposes, be foreclosed. No reasonable investor, who is made aware that his conversion rights into common stock might thus be eliminated, would purchase such securities. The continued sale of convertible securities without specific advance warning and notice of the eventuality of potential conversion right destruction can work a major deceit on the investing public.

CONCLUSION.

For the foregoing reasons, petitioners submit that:

1. The judgment and order approving the settlement and merger should be vacated in entirety, with instructions to dissolve the order granting the permanent injunction contained therein.

2. This case should be remanded to the District Court with such appropriate directions as will prohibit alteration or impairment of the conversion rights into common stock of all Debentures owned by petitioners and other owners thereof without the affirmative consent of each Debenture owner affected.

Respectfully submitted,

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Dated: July 29, 1977

APPENDIX A.

Memorandum Opinion #45364.

(Filed November 16, 1976)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Civ. 5755

EDWARD BRUCKER and DANIEL R. KAPLAN, as Trustees under the Trust Agreement dated November 15, 1968, made by WILTRUD E. GADBOYS, as Grantor, CECIL G. HUSKEY, W. T. STRATTON and NORTE & CO., a partnership composed of JOSEPH C. GALDI and RITA D. GALDI,

Plaintiffs,

—against—

THYSSEN-BORNEMISZA EUROPE N. V., THYSSEN-BORNEMISZA, INC., THYSSEN-BORNEMISZA HOLDINGS, INC., MARINE MIDLAND BANK, INDIAN HEAD, INC., JAMES G. FERGUSON, JAMES M. FLACK, ANDREW KALMAN, PAUL W. McALISTER, JOHN E. O'SULLIVAN, RICHARD J. POWERS, JAMES E. ROBISON, ROBERT M. SCHWARZENBACH, MARSHALL F. SMITH, HERBERT E. BACHRACH, GERARD B. HUISKAMP, WHITE, WELD & CO., INCORPORATED, L. EMERY KATZENBACH, H. H. THYSSEN-BORNEMISZA, R. L. GENILLARD and CHEMICAL BANK,

Defendants.

75 Civ. 229

—

WILLIAM B. WEINBERGER,

Plaintiff,

—against—

RICHARD J. POWERS, JAMES M. FLACK, ANDREW KALMAN, PAUL W. McALLISTER, JOHN E. O'SULLIVAN, JAMES E. ROBISON, ROBERT M. SCHWARZENBACH, MARSHALL F. SMITH, JAMES G. FERGUSON, THYSSEN-BORNEMISZA, INC. and INDIAN HEAD, INC.,

Defendants.

—

75 Civ. 1736

—

SHAMROCK CORPORATION, individually and on behalf of all holders of Common Stock and Warrants of Indian Head, Inc., similarly situated,

Plaintiffs,

—against—

INDIAN HEAD, INC., THYSSEN-BORNEMISZA GROUP N. V., THYSSEN-BORNEMISZA, INC., WHITE, WELD & CO. INCORPORATED, et al.,

Defendants.

Memorandum.

STEWART, *District Judge*:

Before the Court is an application pursuant to Rule 23 of the Federal Rules of Civil Procedure for approval of a proposed settlement. Counsel for both plaintiffs and defendants have submitted well documented papers in

support of the proposed settlement. Objectors have presented papers in response, and have been heard at hearings before this Court on October 13 and 18, 1976. Upon a detailed review of the arguments and documents submitted by all parties, it is the Court's conclusion that the settlement is fair and reasonable and should be approved.

Indian Head is a diversified American company which in 1973 had approximately 5,425,000 shares of common stock outstanding.[1] The common stock was listed on the New York Stock Exchange. Warrants were issued and outstanding pursuant to a 1965 agreement, and were listed on the American Stock Exchange.[1A] $25,000,000 of 5½% convertible subordinated debentures due April 15, 1993 (in denominations of $1,000), were also issued and outstanding subject to the terms and conditions of an Indenture dated April 15, 1968, between Indian Head and Marine Midland Grace and Trust Company of New York as Trustees ["Indenture"].

Thyssen-Bornemisza Europe, N. V. ["TBE"] is an international industrial holding company with headquarters in the Netherlands. In September, 1973, pursuant to a Memorandum of Understanding between TBE and Indian Head,[2] TBE made a tender offer at $27 a share, and

1. It also had 649,000 shares reserved for issuance to the convertible debenture holders pursuant to their conversion rights, and 111,667 shares reserved for the conversion of preferred shares.

1A. "Each Warrant is issued pursuant to the Warrant Agreement with the Chemical Bank of New York as Warrant Agent ("CHEMICAL"), and entitles the holders through May 15, 1990 to purchase one share of common stock, or an aggregate of 400,000 shares, at the following exercise prices: $20 per share if exercised before the close of business on May 15, 1970; $25 per share to May 15, 1975; $30 per share to May 15, 1980; $35 per share to May 15, 1985; and $40 per share to May 14, 1990;" Plaintiffs' affidavit p. 23.

2. Indian Head agreed in the Memorandum of Understanding to 1) sell TBE 750,000 shares of Indian Head's authorized but unissued common stock at $27 per share; 2) cooperate with TBE in the first tender offer; 3) elect to the Indian Head Board of Directors

acquired approximately 33.9% of the common stock;[3] although initially it had offered to buy only between 26% and 32%.

Prior to the tender offer, the New York Stock Exchange had indicated to Indian Head and TBE that ownership by TBE of over 32% would probably result in delisting the common stock. This information was included in the statutory notice to shareholders.[4] In paragraph 9 of this same notice to shareholders, TBE disclaimed any present intention to acquire control of Indian Head.

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2. (Cont'd.)
Huiskamp (Chairman of TBE's Board of Management) and Bachrach (a member of TBE's Board of Management and director of its Corporate Planning and Development), and to make one a member of the Executive Committee and one a member of the Finance Committee. TBE agreed to buy from the Directors of Indian Head up to 50,000 of their shares, and to name Robison (Indian Head's former president) to the TBE Supervisory Board (which makes TBE policy), if the tender offer succeeded.

3. TBE's initial offer was to purchase from the public between 750,000 and 1,100,000 shares of common stock, in addition to 750,000 to be purchased directly from Indian Head's authorized but unissued stock. This would have given them 26% to 32% of the stock. At the expiration of the offer 1,213,619 shares had been tendered, and although this was slightly in excess of the number of shares TBE sought, TBE states that it agreed to purchase all shares tendered in order not to disappoint the tendering stockholders (Defendants' Joint Memorandum in Support of Proposed Settlement, p. 3) ["Defendants' Memorandum in Support"].

4. ". . . if the ownership by TBG (later changed to TBE) of Indian Head common stock should arise above 32% (30%, if 30% or less is purchased pursuant to this offer and the agreement referred to above) such additional ownership might ultimately result in the delisting of Indian Head common stock from the Exchange. TBG has expressed to Indian Head its commitment that it will consult with Indian Head before taking any action, other than the transactions described in this offer, which would increase TBG's ownership of Indian Head common stock beyond 30% of the outstanding shares. Delisting could also result if the number of persons holding at least 100 shares of Indian Head common stock (approximately 4,000 at the present time) should fall below 1,200." (Plaintiffs' Exhibits in support of settlement, Exhibit 24, ¶ 13) ["Plaintiffs' Exhibits"].

> Except to the extent described above, it is not the present intention of TBE to attempt to acquire control of Indian Head by means of these transactions, nor in its capacity as a major stockholder of Indian Head does TBE now have or intend to develop plans or proposals to liquidate Indian Head, to sell its assets or to merge it with any other person or to make any change in its business, management or corporate structure. TBE does intend to vote its shares in a manner which is intended to benefit all of the stockholders of Indian Head, including TBE. (Plaintiffs' Exhibit 24.)

Indian Head's management made no recommendation to its shareholders with respect to this first tender offer—though it did state in the notice that it cooperated with TBE in making the offer (it made available a list of shareholders).

No notice of this first tender offer or of the possible delisting of the common stock was sent to the debenture holders, warrant holders or preferred share holders. However, the 1973 Annual Report did refer to the tender offer and the resulting acquisition of the stock.

In July, 1974, TBE made a second tender offer to buy all remaining Indian Head common stock, (again at $27 a share), and all outstanding warrants at $2.25 per warrant. This second tender offer was financed by a $50,000,000 long-term revolving credit agreement with the Chase Manhattan Bank, N. A. and fourteen other banks located outside the United States. Plaintiffs claim that these financial arrangements were made just nine weeks after the first tender offer (although the second tender offer was not to take place for 7 more months), and thus supports an inference that TBE's statement in its first tender offer that it did not intend to liquidate Indian Head, sell it, or

merge it, was false and misleading. The defendants dispute this claim.

The notice to shareholders of the second tender offer disclosed, among other things: the financing arrangements for the offer (Plaintiffs' Exhibit 45, ¶ 11); the fact that Indian Head's Board of Directors and management made no recommendation, although they had cooperated with TBG (later changed to TBE) (*Id.* ¶ 12); the number of shares each member of the Indian Head Board was going to tender or retain (*Id.*); the fact that as a result of the 1974 tender offer the common stock might no longer meet the requirements of the New York Stock Exchange for continued listing and the Exchange might delist the shares (*Id.* ¶ 13); that TBG intended to acquire control of Indian Head, but did not have any present plans to sell its assets or merge. The notice also stated:

> TBG expects to purchase a substantial majority of the common stock as a result of this offer and thereby acquire control of the Company. TBG believes the Company to be well managed and to present an attractive long-term investment opportunity. TBG presently does not have any plans or proposals to make any major changes in the Board of Directors, management, corporate structure, operating policies or business of the Company or to suggest its liquidation, the sale of its assets or a merger with any other person. However, it reserves the right to make changes in the future should it determine that the best interests of the Company and its stockholders are served thereby. (*Id.* ¶ 9).

No copy of this notice was sent to the registered convertible debenture owners.

As a result of this second tender offer, TBE's total ownership of common stock increased to approximately

90.6%. They also obtained about 8% of the outstanding warrants. Shortly after the tender offer, the New York Stock Exchange delisted Indian Head's common stock and convertible debentures, and thereafter they were traded over the counter.

The three class action lawsuits involved in this settlement were brought, as a result of these two tender offers, against TBE, Indian Head, TBI,[5] Marine Midland, Trustee for the Debentures, Chemical Bank, warrant agent, White, Weld & Co., Inc., Indian Head's investment advisor, and various individual defendants who are or were officers and directors of Indian Head.[6] The Complaints in all three actions alleged violations of the Williams Act § 14(d) and (e)[7] and § 10b of the Securities Act of 1934[8] and Rule 10b-5 promulgated thereunder. The convertible debenture owners claim that the failure to send them notice was a violation of the Act and that this prevented them from favorably exercising their conversion rights. They also claim that TBE's acquisition of control constituted a constructive merger in violation of the Indenture. The warrant owners claim the tender offers were false and misleading. Both the Brucker and Shamrock Complaints also allege a common law breach of fiduciary obligations.

The defendants moved either for dismissal of the Complaints or for summary judgment, and the plaintiffs cross-

5. A Maryland corporation which is a wholly-owned subsidiary of TBE, formed for the express purpose of acquiring Indian Head's stock and warrants.

6. *Edward Brucker, et al. v. Thyssen-Bornemisza Europe, N. V., et al.*, 74 Civ. 5755 ["Brucker"] and *William Weinberger v. Powers, et al.*, 75 Civ. 229 ["Weinberger"] were originally brought on behalf of convertible debenture owners of Indian Head. *Shamrock Corporation v. Indian Head, et al.*, 75 Civ. 1736 ["Shamrock"] was brought on behalf of all holders of common stock and warrants of Indian Head.

7. 15 U. S. C. 78n *et seq.*

8. 15 U. S. C. 78j(b).

moved for summary judgment. These motions were *sub judice* on February 12, 1976, when TBE announced a proposed "short-form" merger [9] of Indian Head into a TBE affiliate which was to take place on March 19, 1976.[10]

The Brucker plaintiffs moved to enjoin the merger through an amended class action complaint,[11] which was filed on behalf of all owners of warrants and common stock, as well as the debenture holders previously represented. On March 4, at the opening of the preliminary injunction hearing, the defendants announced that they were withdrawing the merger plan.

Subsequent to the announcement of the proposed merger, but prior to its withdrawal, the Court of Appeals for the Second Circuit issued opinions in *Marshel v. AWF Fabric,* 533 F. 2d 1277 (2d Cir.), *vacated,* 45 U. S. L. W. 3272 (Oct. 12, 1976), and *Green v. Santa Fe Industries, Inc.,* 533 F. 2d 1283 (2d Cir.), *cert. granted,* 45 U. S. L. W. 3220 (Oct. 5, 1976), which considerably changed the law as to short-form mergers, and left many questions for future litigation. This uncertainty in the law led defendants to withdraw their merger proposal, and to negotiate with the plaintiffs, Transcript, First Settlement Hearing on October 13, 1976, at 22 ["1st Tr."].

A Stipulation and Agreement of Settlement was reached and signed by all the parties in late July. The

9. Under § 253 of the Delaware Corporation Law.

10. Under the proposed merger, the common shareholders would be paid $30 cash per share (compared to the $27 price of the tender offers), the convertible debentures could be surrendered for $779.22 cash, the conversion value at $30 per share (compared to the $701.30 tender offer conversion value) or held until maturity earning the regular interest payments but without the right to convert. The warrant owners were to receive nothing.

11. The amended complaint claimed that the merger plan constituted a redemption, and thus the debenture holders were entitled to $1,033, the redemption price, rather than the conversion price of $779.22.

Court then ordered, among other things, that the three actions should be maintained as class actions for purposes of settlement only, that a settlement hearing be held on October 13, and that a notice of this hearing and of the settlement terms be sent to all the members of the various classes, so that those who wanted to be excluded could opt out, and those who wanted to object could do so.

Two objectors appeared at the settlement hearings, Morton P. and Marjorie T. Rome, trustees of a trust which owns 25 debentures, and Morris Shuldenrein,[12] owner of 7,500 warrants. Since most of the Romes' objections go to the scope of the settlement, and not its actual terms, we will defer discussion of their objections for the moment, and first discuss the fairness of the actual terms of the settlement.

The settlement agreement provides for the merger of Indian Head into a subsidiary of Thyssen-Bornemisza, Inc., ["TBI"]. Under the terms of the 32 million dollar settlement, the common stockholders will receive $32 a share upon the merger. The owners of the 5½% convertible subordinated debentures due in 1993,[13] have a number of options: 1) hold on to the debentures and collect the interest until 1993, at which time they can collect the $1000, 2) convert now at $32.50 a share, and receive $844.16 per $1000 debenture,[14] or 3) convert any time between the merger and 1993 and receive $32 per share (or $831.17 per $1000 debenture), a fixed cash sum.[15] In addition,

12. Although Mr. Shuldenrein did not properly file his objection, the Court heard his statement, and has considered his objection.

13. The convertible debentures are issued in face amounts of $1000 or integral multiples thereof, and are convertible into 25.974 shares of common stock per $1000 in principle amount.

14. This applies only to debenture owners who were owners on August 2, 1976 and who still own on the date of the merger.

15. As is apparent, those debenture holders who convert as part of the settlement will receive $.50 more per share than those

former owners of Indian Head convertible debentures who held them on September 27, 1973,[16] and sold on or before July 1, 1974,[17] will receive up to $50 per debenture. Former owners of debentures who held them on July 2, 1974 and sold between July 12, 1974[18] and August 2, 1976,[19] will receive up to $100 per debenture, the exact amount determined by the sales price.

As to the warrant holders, those who have owned warrants continuously from July 12, 1974 to the date of the merger will receive $4.00 per warrant. As to the warrant holders who have not owned their warrants continuously: owners on August 2, 1976, who still own on the date of the merger will receive $2.50 per warrant; owners of warrants on July 2, 1974, who sold their warrants between July 12, 1974, and August 2, 1976, will receive $1.50 per warrant. There will be no payment for any warrant sold between August 1, 1973, and July 1, 1974. In addition to the above amounts, TBI will pay all the expenses of administering the settlement and will pay up to $600,000 for counsel fees and expenses as awarded by the Court. Plaintiffs' attorneys agree to accept an award not to exceed $600,000.

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15. (Cont'd.)
who convert later. The difference is due to the fact that the Indenture requires the debenture holder to receive what the common stockholders receive (here, $32 a share) in the case of a merger. Transcript, Second Settlement Hearing on October 18, 1976, p. 68 ["2d Tr."].

16. Date of the first tender offer.

17. On July 1, 1974, Indian Head requested suspension of trading of its stock. Trading was suspended from July 2 until July 12, 1974.

18. July 12, 1974, was the date of the second tender offer.

19. August 2, 1976, is the date the Order in the instant case was signed.

The general principles which guide the Court in assessing the fairness, reasonableness and adequacy of a class action settlement are clear.

> . . . the role of a court in passing upon the propriety of the settlement of a . . . class action is a delicate one . . . since '[t]he very purpose of a compromise is to avoid the trial of sharply disputed issues and to dispense with wasteful litigation,' the court must not turn the settlement hearing 'into a trial or a rehearsal of the trial.' Rather . . . it must reach 'an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated' and 'form an educated estimate of the complexity, expense, and likely duration of such litigation . . . and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise.' *Newman v. Stein*, 464 F. 2d 689, 691-92 (2d Cir.), *cert. den.*, 409 U. S. 1039 (1972); (citations omitted).

Levin v. Mississippi River Corp., 59 F. R. D. 353, 361 (S. D. N. Y. 1973). Some of the factors considered "relevant to a full and fair assessment" of the proposed settlement by the District Court, and approved by the Court of Appeals in *City of Detroit v. Grinnell Corporation*, 495 F. 2d 448, 463 (2d Cir. 1972), were: 1) the complexity, expense and likely duration of the litigation; 2) the reaction of the class to the settlement; 3) the stage of the proceedings and the amount of the discovery completed; 4) the risks of establishing liability; 5) the risks of establishing damages; 6) the risks of maintaining the class action through the trial; 7) the ability of the defendants to withstand a greater judgment; 8) the range of reasonableness of the settlement fund in light of the best possible recovery; 9) the range of reasonableness of the settlement

fund to a possible recovery in light of all the attendant risks of litigation. At the heart of the analysis the Court must evaluate the strength of the plaintiffs' case, considering both the likelihood of establishing liability and the consequent probable reward in damages. It must consider these factors in light of the terms of the settlement.

In the instant case, there are complicated questions of law on both the issues of liability and damages. While the role of a Court in determining the fairness of a settlement is not to decide these issues, the Court should, and here does, take note of the fact that these complex questions of law are unresolved, thus making this case an appropriate one for settlement. One of the primary unresolved legal questions involves the interpretation and application of *Marshel, supra, Green, supra,* and *Merit v. Libby, McNeill and Libby,* 533 F. 2d 1310 (2d Cir. 1976) to the attempted short-form merger in this case, particularly in light of the fact that the Indian Head merger is distinguishable on its facts from each of the above cases. Thus the Court does not agree with the objectors' assertion that a liability is clear with respect to issues arising from the short-form merger. This case also presents complex legal and factual questions on a variety of other issues, among them: whether or not the 1973 and 1974 tender offers were false and misleading in failing to disclose that TBE would merge Indian Head into an affiliate; whether or not under *Van Gemert v. Boeing,* 520 F. 2d 1373 (2d Cir.), *cert. den.,* 423 U. S. 947 (1975), Indian Head was obligated to send notice of the tender offers to the registered debenture owners.

In determining the reasonableness of the amount of the settlement in relation to the amount of a possible recovery after trial, the Court has considered the expert opinions submitted to the Court by Martin Whitman of

M. J. Whitman & Co., and Robert Winston, of Winston Perry Financial Corporation, the evaluation by counsel, and the cost of litigating the aforementioned legal issues. The Court has also noted the favorable reaction of the classes to the settlement.[20] In light of these factors, we find the settlement fair and reasonable.[21]

The Romes raise a number of objections to the proposed settlement; most of them going to the scope of the settlement, and not the fairness of its terms. First they object to the designation of the suits as class actions for purposes of settlement only, on the grounds that this is unauthorized by Rule 23 and is violative of the provisions of the Manual for Complex Litigation, which advises against "a tentative determination of a class action request for the purpose of settlement."[22] The Second Circuit has stated in *Grinnell, supra,* that the Manual recommendations "were not meant to be intractable rules," and that the major concern of the Manual may be satisfied where, as here, the settlement provides "for notice of a hearing

20. The plaintiff wrote in his affidavit in support of the proposed settlement, that:

> Out of $14,295,000 convertible debentures, the owners of $1,240,000 communicated with us. The owners of $1,212,000 (including L. F. Rothschild & Co.) indicated acceptance, the owners of $27,000 opted out (not including $25,000 of the Rome objectants referred to hereafter). The owner of $1,000 said she would not sell a $1,000 bond for $844.16. [The acceptance of an additional $172,000 was noted at the hearing, 1st Tr. at 18.]
>
> Out of 585,386 shares of publicly held common stock, the owners of 4,851 shares communicated with us, with the owners of 701 shares indicating acceptance, the owners of 3,271 shares opting out, and one owner of 1,050 shares objecting.
>
> Out of 349,467 publicly held warrants, the owners of 9,070 communicated with us, all of whom indicated acceptance. [Plaintiff's affidavit at 9-10].

21. Thus we find no merit in Mr. Shuldenrein's claim.

22. Manual for Complex Litigation § 1.40 (1975).

and an opportunity to challenge the fairness or any other aspect of the proposed settlement," *Grinnell*, 495 F. 2d at 466. In addition, *Grinnell* stated that the Manual's objectives may be satisfied where, as here, the settlement was not negotiated in the early stages of the dispute, but rather after the parties had engaged in considerable litigation and were able to assess the risks of success, and where, as here, there were not different counsel vying to be class representatives before the settlement agreement was reached and publicized, thus not presenting a situation such as in *Ace Heating and Plumbing Co. v. Crane Co.*, 453 F. 2d 30 (3d Cir. 1971). Therefore, the designation of these actions as class actions for purposes of settlement only was proper in this case.

The objectors also claim that there is an abuse of the use of Rule 23 as it is applied in this case to the convertible debenture holders. They note that the Rules Enabling Act [23] under which the Federal Rules of Civil Procedure were promulgated, specifically provided that the Rules should not abridge or modify any substantive rights. The abuse to which the objectors point is the proposed settlement, which they contend will abridge the substantive conversion rights of the debenture holders. We do not agree that the settlement abridges any substantive rights of the debenture holders (see pp. 16-18 *infra*). Further, we find that the Rule 23 procedures were properly followed. Full notice was given to all members of the classes, and their rights to appear and object, or to opt out, were fully explained. Thus the Rule 23 procedures have protected the substantive rights of the individual debenture holders.

The Romes also challenge the adequacy of the notice of the proposed settlement. The notice complied with

23. 28 U. S. C. 2074, as amended November 6, 1966, Pub. L. 89-773, § 1, 80 Stat. 1323.

23(c)(2) and clearly advised the class members of the nature of the pending action and the general terms of the settlement, and indicated where more detailed information was obtainable and where objections could be heard. All material facts were included.

Many of the Romes' objections arise out of an assertion that the Indenture prevents any class action settlement involving debenture owners, as the Court can in no way alter ". . . the creditors [debenture holders] . . . separate and several contract rights . . ." [24] without the individual written consent of each holder. They claim that the settlment can only bind those holders who affirmatively opt in and cannot bind those who do not respond. They also claim that the Indenture agreement prevents a forced conversion into money in the event of a merger, and requires either that Indian Head redeem the debentures [25] or that Indian Head respect the absolute right to convert into common stock.

An analysis of these arguments requires an interpretation of the Indenture agreement, particularly Sections 5.06, 12.02, 13.01, and 13.02 (Articles 5, 12 and 13 of the Indenture are set out in Appendix A). Objectors argue that § 12.02, which provides for approval by two-thirds of the outstanding debentures when the issuer wishes to change or modify the Indenture itself, and requires consent of each debenture holder when the right to convert is altered or imparied, should be interpreted in this case to require the written consent of each debenture holder, since an attempt is being made to alter or impair the conversion right (2d Tr. at 6-10).

The plaintiffs and defendants argue in response that the voting requirements of § 12.02 do not apply in the

24. Reply Brief of Objectors, p. 3.

25. At the current redemption price of $1,033 (103.30%).

case of a merger. Rather, they state that § 5.06, § 13.01 and § 13.02 (which do not call for individual consent or a two-thirds vote) should govern the merger,[26] since these sections specifically discuss what is to occur in case of a merger (Defendants' Memorandum in Response to Objectors' Brief at 20; 2d Tr. at 2-10). § 5.06 provides that:

> In case of any . . . merger into another corporation . . . such successor . . . shall execute and deliver to the Trustee a supplemental indenture . . . providing that the holder of each debenture then outstanding shall have the right thereafter to convert such debenture into the kind and amount of shares of stock and other securities and property receivable upon such . . . merger . . . by a holder of the number of shares of common stock of the company into which such debenture might have been converted immediately prior to such . . . merger . . . .

First, we agree that § 5.06 should control here because it contains a detailed and specific provision as to what the debenture holders' rights are in a merger while § 12.02 deals with their rights in a general context.

In the case of a merger, § 5.06 requires that the supplemental Indenture contain the right to convert into whatever form of property the shareholders receive in the merger. Thus the debenture holders have never had an absolute right to convert into Indian Head stock in a merger, but only the right to convert into whatever form of "property" the shareholders would receive. Defendants

26. The debenture holders were alerted to the applicability of these sections by the debenture itself, which stated that ". . . the holder . . . has the right . . . to convert this debenture into fully paid and non-assessable shares of Common Stock of the Company . . . subject to such adjustment, if any, of the conversion rate and the securities or other property issuable upon conversion as may be required by the provisions of the Indenture."

argue that cash is "property" within the meaning of § 5.06. We agree that cash is within the scope of the term "property" as used in § 5.06, and note that it has been so interpreted in *Broenen v. Beaunit*, 440 F. 2d 1244 (7th Cir. 1970). Here, as a result of the proposed merger, the Indian Head shareholders will receive only cash for their stock. Thus the provision in the settlement agreement allowing for conversion of the debentures into cash only is proper under § 5.06 because this is all the shareholders are receiving. In addition, § 5.06 does not require the individual written consent of each debenture holder when conversion rights are altered pursuant to a merger, so we conclude that the settlement abridges no rights of the debenture holders and can properly bind all debenture holders who do not opt out.

Since we find that no substantive rights of the debenture holders are abridged by this settlement, this dispenses with the following objectors' claims: 1) that representation of the class was not adequate since class representatives cannot assert rights running individually and severally to each holder (Objectors' Brief in Support of Objections to Proposed Settlement at 15-16, 23-25); 2) that their constitutional rights under the Fifth and Fourteenth Amendments and Article One, Section 10 were violated (*Id.* at 16-17); 3) that the class is not sufficiently numerous, since not a sufficient number assented in writing (*Id.* at 23); and 4) that the settlement violates rights of all non-assenting convertible debenture owners under Delaware law (*Id.* at 40), New York law (*Id.* at 41), and Pennsylvania law (*Id.* at 43).

The Rome objectors also claim that the settlement agreement violates various sections of the Securities Act of 1933, 15 U. S. C. § 77a *et seq.* ["1933 Act"], the Secu-

rities Exchange Act of 1934, 15 U. S. C. § 78a *et seq.* ["1934 Act"], and the Trust Indenture Act of 1939, 15 U. S. C. § 77aaa *et seq.*

Objectors claim that § 5(c) of the 1933 Act[27] has been violated since the proposed settlement and notice of settlement is an "offer to sell" as well as an "offer to buy" securities, and as such the parties have not complied with the registration requirements of the Act. The settlement agreement is clearly not an offer by TBE to sell a security. While the settlement may be interpreted to encompass an "offer to buy," we find that the registration requirements of § 5(c) were not meant to apply to offers of an issuer or controlling stockholder of an issuer, to acquire for cash the issuer's outstanding securities.

> When the issuer itself is making an offer to buy its own securities—at least when the offer goes to a substantial number of security holders—§ 5(c) would seem literally to apply in the sense that there is no specific exemption or exclusion; for that *is* an offer (and hence a transaction) "by an issuer." On the other hand, however tempting it might have been before the special legislation of 1968 to reenforce Rule 10b-5 under the 1934 Act by using § 5(c) to attack the problems of inadequate disclosure by issuers in public tender offers . . . not merely the legislative history of § 5(c) but the whole registration structure of the 1933 Act is utterly inconsistent with any concept of issuers registering public offers to buy as distinct from public offerings to sell. 4 Loss, *Securities Regulation* 2317-8 (Supplement to 2d Ed., 1969).

Rather, Loss found that the provision "was originally inserted solely for the purpose of preventing *dealers* from

27. 15 U. S. C. § 77e.

making offers to buy from underwriters during the waiting period." 1 Loss, *Securities Regulation* 212 (2d Ed., 1961).

Even if the requirements of § 5(c) were held to apply to offers by an issuer to buy its own stock, plaintiffs and defendants claim that § 3(a)(10)[28] would exempt the settlement from the registration requirements.[29] Section 3(a)(10) states:

> Sec. 3(a) Except as hereinafter expressly provided the provisions of this title shall not apply to the following classes of securities:
>
> ° ° °
>
> (10) Any security which is issued in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the terms and conditions of such issuance and exchange are approved, after a hearing upon the fairness of such terms and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court, or any official or agency of the United States, or by any State or Territorial banking or insurance commission or other governmental authority expressly authorized by law to grant such approval. . . .

According to the objectors, the Supplemental Indenture with modified conversion rights which will be issued as a consequence of the settlement to debenture holders

28. 15 U. S. C. § 77c(a)(10).

29. 3(a)(10) has been applied to judicially approved settlements, see *LIN Broadcasting Corp.* [1972-73 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 79,154 at 82,512; *VTR Inc.* [1971-72 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 78,518 at 81,117.

who do not convert, is a "security" within the meaning of § 5(c) (Objectors' Brief at 31). They contend, therefore, that the provisions of § 5(c) are applicable. If so, it would seem to follow that § 3(a)(10) would also apply to exempt the transaction, since there would be an issuance of a security (Supplemental Indenture) in exchange for "bona fide outstanding securities" (the Indenture).[30] The objectors argue further, nevertheless, that there is no exemption because the required judicial hearing was held after the issuance of the security, not before (2d Tr. at 32-34).

This view is predicated on the assumption that the notice of settlement was an issuance of a security. The Court does not hold that view because the terms of the settlement do not become effective until approved by the Court. The hearing on the fairness of the terms and conditions of the settlement at which all persons affected had an opportunity to appear and be heard, was held on October 13 and 18, 1976. Thus the hearing fully complied with the requirements of § 3(a)(10).

30. Because the issuance of the Supplemental Indenture is not a specific term of the settlement, but is activated by the terms of the prior Indenture (which require such a Supplemental Indenture in the case of a merger), it could be argued that the settlement itself is purely a cash exchange, whereby TBE is issuing cash only for Indian Head securities. While under this view § 3(a)(10) would seem not to be directly on point (since no security is being issued), it might be held to be applicable in light of the purpose of the registration sections. The purpose of requiring registration is to place the facts before the public, and to protect against fraud and misrepresentation, 1 Loss, *Securities Regulation* 178-181 (2d Ed., 1961). Section 3(a)(10) provides an exception to this requirement where the facts have been disclosed and the fairness of the terms and conditions have been passed on by a Court. While this section only applies when securities are issued, the same policy considerations would seem to apply to transactions where cash only is being offered in exchange for an outstanding security. Thus an exemption from § 5(c) should be allowed for offers to buy outstanding securities with cash which have been judicially approved after a hearing.

The objectors also claim the class notice omitted certain material facts[31] in violation of § 17(a) of the 1933 Act, and sections 10(b) and 14(e) of the 1934 Act. We find the notice in this case more than adequate, and that these sections have not been violated. Since we also have concluded that no terms or rights under the Indenture are violated by the settlement, [see pp. 15-18 *supra*], no action will lie under the Trust Indenture Act.

In addition, the objectors claim that the notice of settlement violates sections 13(d), 13(e), 14(d), and 14(e) of the 1934 Act[32] and the Rules promulgated under these sections. They claim that the notice constitutes a "tender offer," and as such the defendants have failed to comply with the filing requirements of the Act. While the settlement agreement does contemplate what might technically be described as a tender offer,[33] we think that these sections were not meant to apply to judicially approved settlement agreements, particularly in light of the legislative history.

> Congress' principal concern was to assure the shareholder substantial timely disclosure . . . Congress determined that the shareholder should have the 'relevant facts' so he can make an informed decision on whether to sell his holdings or to maintain his investment in a company that might be changing hands and undergoing significant transformation. Note, 86 *Harv. L. Rev.* 1250, 1256 (1973).

31. Objectors' Brief at 25 and 32.

32. 15 U. S. C. § 78m *et seq.* and § 78n *et seq.*, passed in 1968 and commonly known as the "Williams Act."

33. The term "tender offer" is not defined in the statute, regulations, or legislative history. Thus Courts have found that they have latitude to apply the provisions of § 14 in light of the factual context. *Nachman Corporation v. Halfred, Inc.*, [1973-74 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 94,445 at 95,589, 590 (N. D. Ill., 1973).

As noted by the Seventh Circuit:

> . . . the overriding purpose of Congress in enacting this legislation was *to protect the individual investor* when substantial shareholders or management undertake to acquire shares in a corporation for the purpose of solidifying their own position in a contest over how or by whom the corporation should be managed. In the words of Senator Williams: '[The bill] is designed solely to require full and fair disclosure for the benefit of investors' . . . *Bath Industries, Inc. v. Blot*, 427 F. 2d 97, 109 (7th Cir. 1970). See also *Electronic Specialty Co. v. International Controls Corp.*, 409 F. 2d 937, 945 (2d Cir. 1969); 113 Cong. Rec. 24664 (1967).

That the purpose was to protect the individual investor can also be seen from looking at what the Act requires to be disclosed. It requires disclosure of, among other things, the identity and background of the person or group making the tender offer; the size of the holdings of the person or group; the source of funds to be used and the financing arrangements for these funds; the purpose of the tender offer, and the plans of the offerer (to liquidate, sell, merge, etc.); and the price, terms, and conditions of the offer.

We find that the individual investors have been more than adequately protected by the procedures followed in the instant judicially-approved settlement, where the individual investor has had full notification of the terms of the offer, the people or group involved, the purpose of the offer and the plans of the offeror. Thus we conclude that the filing requirement of the Williams Act does not preclude this settlement.[34]

34. In addition, 14(d)(8)(b) provides that there is an exemption from the filing requirements of 14(d) for "any offer for or request or invitation for tenders of any security . . . by the issuer of such security."

Accordingly, the Court concludes that the settlement is fair and reasonable, and should be approved.

So Ordered.

Charles E. Stewart, *J.*
United States District Judge

Dated: New York, New York
November 15, 1976.

APPENDIX A

[to District Court Memorandum Opinion]

Article Five
Conversion of Debentures

Section 5.01. The holder of any Debenture or Debentures shall have the right at any time prior to maturity, at his option, to convert, subject to the terms and provisions of this Article Five, the principal amount of any such Debenture or Debentures (or any portion of the principal amount thereof which is an integral multiple of $1000) into fully paid and non-assessable shares of Common Stock at the conversion rate of 25.974 shares of Common Stock for each $1,000 principal amount of Debentures, subject in each case to any adjustments in such conversion rate pursuant to the provisions of Section 5.04 (except that with respect to any Debenture or Debentures which shall be called for redemption such right shall terminate at the close of business on the second business day next preceding the date fixed for redemption of such Debenture or Debentures, unless the Company shall default in payment due upon redemption thereof), upon surrender of the Debenture or Debentures, the principal of which is so to be converted, to the Company at any time during usual business hours at the office or agency to be maintained by it in accordance with the provisions of Section 6.02, and, if so required by the Company, accompanied by a written instrument or instruments of transfer in form satisfactory to the Company and the Trustee duly executed by the holder or his duly authorized agent or legal representative. Prior to delivery of any certificate or certificates representing shares of Common Stock into which the principal of

such Debenture or Debentures is so to be converted, the Company shall have received a written notice at its said office or agency from the holder of the Debenture or Debentures so surrendered specifying the name or names (with address) in which said certificate or certificates are to be issued. For convenience, the conversion of all or a portion, as the case may be, of the principal of any Debenture into Common Stock is hereinafter sometimes referred to as the conversion of such Debenture. All Debentures surrendered for conversion shall, if surrendered to the Company or any conversion agent, be delivered to the Trustee for cancellation and cancelled by it or, if surrendered to the Trustee, shall be cancelled by it, and no Debentures shall be issued in lieu thereof. The Trustee within a reasonable time shall upon request return cancelled Debentures to the Company.

In case any Debenture shall be surrendered for conversion of only a portion of the principal amount thereof, the Company shall execute and the Trustee shall authenticate and deliver to the holder of such Debenture, at the expense of the Company, a new Debenture or Debentures in principal amount equal to the unconverted portion of the Debenture so surrendered.

In case of the surrender of any Debenture for conversion (in whole or in part) on a date after the record date (as defined in Section 2.03) for the payment of any interest on Debentures and before the date for payment of such interest, such Debenture shall be accompanied by funds in an amount equal to the amount of interest which would have been payable on such interest payment date in respect of the principal represented by the Debenture (or portion thereof) so surrendered for conversion had the same not been so surrendered for conversion; *provided, however,* that no such funds need be deposited in the case of any Debenture (or portion thereof) which has been

duly called for redemption prior to such payment date. The funds so deposited shall be paid on the interest payment date to the person in whose name such Debenture (or the Debenture or Debentures in exchange or substitution for which such Debenture shall have been issued) was registered on such record date; *provided, however,* that if the Company shall default in the payment of interest due on the Debentures on such interest payment date, such funds shall be repaid to the person who deposited the same.

SECTION 5.02. As promptly as practicable after the surrender, as herein provided, of any Debenture or Debentures for conversion, the Company shall deliver or cause to be delivered at the office or agency to be maintained by it in accordance with the provisions of Section 6.02 to or upon the written order of the holder of the Debenture or Debentures so surrendered a certificate or certificates representing the number of fully paid and non-assessable shares of Common Stock into which such Debenture or Debentures (or portion thereof) shall have been converted in accordance with the provisions of this Article Five. Prior to delivery of such certificate or certificates, the Company shall have received at its said office or agency from the holder of the Debenture or Debentures so surrendered the written notice referred to in Section 5.01 with respect to the name or names (with address) in which said certificate or certificates are to be issued. Subject to the following provisions of this Section and of Section 5.04, such conversion shall be deemed to have been made immediately prior to the close of business on the date that such Debenture or Debentures shall have been surrendered for conversion, so that the rights of the holder of such Debenture or Debentures (or the portion thereof being converted) as a Debentureholder shall cease at such time, and

the person or persons entitled to receive the shares of Common Stock upon conversion of such Debenture or Debentures shall be treated for all purposes as having become the record holder or holders of such shares of Common Stock at such time, and such conversion shall be at the conversion rate in effect at such time; *provided, however,* that no such surrender on any date when the stock transfer books of the Company shall be closed shall be effective to constitute the person or persons entitled to receive the shares of Common Stock upon such conversion as the record holder or holders of such shares of Common Stock on such date, but such surrender shall be effective to constitute the person or persons entitled to receive such shares of Common Stock as the record holder or holders thereof for all purposes at the time immediately prior to the close of business on the next succeeding day on which such stock transfer books are open, and such conversion shall be at the conversion rate in effect at such time on such next succeeding day.

SECTION 5.03. No adjustments in respect of accrued interest or dividends shall be made upon the conversion of any Debenture or Debentures.

SECTION 5.04. The conversion rate from time to time in effect shall be subject to adjustment as follows:

(a) In case the Company shall (i) pay a dividend in shares of its capital stock, (ii) subdivide its outstanding shares of Common Stock, (iii) combine its outstanding shares of Common Stock into a smaller number of shares, or (iv) issue by reclassification of its shares of Common Stock any shares of the Company, the conversion rate in effect immediately prior thereto shall be adjusted retroactively as provided below so that the holder of any Debenture thereafter surrendered for conversion shall be entitled to receive

the number of shares of the Company which he would have owned or have been entitled to receive after the happening of any of the events described above had such Debenture been converted immediately prior to the happening of such events. An adjustment made pursuant to this subsection (a) shall become effective retroactively immediately after the record date in the case of a dividend and shall become effective immediately after the effective date in the case of a subdivision, combination or reclassification.

(b) In case the Company shall issue rights or warrants to all holders of its Common Stock entitling them (for a period expiring within 45 days after the record date mentioned below) to subscribe for or purchase shares of Common Stock at a price per share less than the current market price per share of Common Stock (as defined in subsection (d) below) at the record date mentioned below, the number of shares of Common Stock into which each $1,000 principal amount of Debentures shall thereafter be convertible shall be determined by multiplying the number of shares of Common Stock into which such principal amount of Debentures was theretofore convertible by a fraction, the numerator of which shall be the number of shares of Common Stock outstanding on the date of issuance of such rights or warrants plus the number of additional shares of Common Stock offered for subscription or purchase, and the denominator of which shall be the number of shares of Common Stock outstanding on the date of issuance of such rights or warrants plus the number of shares which the aggregate offering price of the total number of shares so offered would purchase at such current market price. Subject to subsection (e), such adjustment shall be made whenever such rights or warrants

are issued and shall become effective retroactively immediately after the record date for the determination of stockholders entitled to receive such rights or warrants.

(c) In case the Company shall distribute to all holders of its Common Stock evidences of its indebtedness or assets (excluding cash dividends or distributions) or rights to subscribe or warrants to purchase (excluding those referred to in subsection (b) above), then in each such case the number of shares of Common Stock into which each $1,000 principal amount of Debentures shall thereafter be convertible shall be determined by multiplying the number of shares of Common Stock into which such principal amount of Debentures was theretofore convertible by a fraction, the numerator of which shall be the current market price (as defined in subsection (d) below) per share of Common Stock on the date of such distribution, and the denominator of which shall be such current market price per share of the Common Stock, less the then fair market value (as determined by the Board of Directors, whose determination shall be conclusive, and described in a statement filed with the Trustee) of the portion of the assets or evidences of indebtedness so distributed or of such subscription rights or warrants applicable to one share of the Common Stock. Subject to subsection (e), such adjustment shall be made whenever any such distribution is made and shall become effective retroactively immediately after the record date for the determination of stockholders entitled to receive such distribution.

(d) For the purpose of any computation under subsections (b) and (c) above, the current market

price per share of Common Stock at any date shall be deemed to be the average of the daily closing prices for the 30 consecutive business days commencing 45 business days before the day in question. The closing price for each day shall be the last reported sales price regular way or, in case no such reported sale takes place on such day, the average of the reported closing bid and asked prices regular way, in either case on the New York Stock Exchange, or, if the Common Stock is not listed or admitted to trading on such Exchange, on the principal national securities exchange on which the Common Stock is listed or admitted to trading, or if not listed or admitted to trading on any national securities exchange, the average of the closing bid and asked prices as furnished by any New York Stock Exchange firm selected from time to time by the Company for the purpose.

(e) No adjustment in the conversion rate shall be required unless such adjustment would require an increase or decrease of at least 1% in such rate; *provided, however,* that any adjustments which by reason of this subsection (e) are not required to be made shall be carried forward cumulatively and taken into account in any subsequent adjustment which (including such carry-forward) requires an increase or decrease of at least 1%. All calculations under this Article Five shall be made to the nearest cent or to the nearest one-thousandth of a share, as the case may be.

(f) Whenever the conversion rate is adjusted, as herein provided, the Company shall promptly file with the Trustee a certificate of a firm of independent public accountants selected by the Board of Directors (who may be the regular accountants employed by the Company) setting forth the conversion rate

applicable after such adjustment and setting forth a brief statement of the facts requiring such adjustment. Such certificate shall be conclusive evidence of the correctness of such adjustment. Promptly after receipt of such certificate, the Trustee, in the name of the Company and as its agent, shall mail a notice specifying such adjustment to each Debentureholder at his last address appearing on the registration books of the Company. The Trustee shall not at any time be under any duty or responsibility to any Debentureholder to determine whether any facts exist which may require any adjustment of the conversion rate.

(g) In the event that at any time, as a result of an adjustment made pursuant to subsection (a) of this Section, the holder of any Debenture thereafter surrendered for conversion shall become entitled to receive any shares of the Company other than shares of its Common Stock, thereafter the number of such other shares so receivable upon conversion of any Debenture shall be subject to adjustment from time to time in a manner and on terms as nearly equivalent as practicable to the provisions with respect to the Common Stock contained in subsections (a) to (f), inclusive, of this Section, and the provisions of Sections 5.02 and 5.05 to 5.09, inclusive, with respect to the Common Stock shall apply on like terms to any such other shares.

SECTION 5.05. No fractional shares or scrip representing fractional shares shall be issued upon the conversion of any Debenture or Debentures. If more than one Debenture shall be surrendered for conversion at one time by the same holder, the number of full shares issuable upon conversion thereof shall be computed on the basis of the aggregate principal amount of the Debentures so

surrendered. If the conversion of any Debenture or Debentures results in a fraction, an amount equal to such fraction multiplied by the closing price (determined as provided in Section 5.04(d)) of the Common Stock on the day of conversion shall be paid to such holder in cash by the Company.

SECTION 5.06. In case of any consolidation of the Company with or merger of the Company into another corporation, or in case of any sale or other disposition of all or substantially all the property of the Company as an entirety to any person, the corporation resulting from such consolidation or such successor or acquiring person, as the case may be, shall execute and deliver to the Trustee a supplemental indenture, in form satisfactory to the Trustee, providing that the holder of each Debenture then outstanding shall have the right thereafter to convert such Debenture into the kind and amount of shares of stock and other securities and property receivable upon such consolidation, merger, sale, lease or other disposition by a holder of the number of shares of Common Stock of the Company into which such Debenture might have been converted immediately prior to such consolidation, merger, sale or other disposition. Such supplemental indenture shall provide for adjustments which shall be as nearly equivalent as may be practicable to the adjustments provided for in this Article Five. The provisions of this Section shall similarly apply to successive consolidations, mergers, sales or other dispositions. Notice of the execution of such a supplemental indenture shall be given in accordance with the provisions of Section 12.02.

The Trustee shall not be under any responsibility to determine the correctness of any provisions contained in any such supplemental indenture relating either to the kind or amount of shares of stock or securities or property

receivable by Debentureholders upon the conversion of their Debentures after any such consolidation, merger, sale, lease or other disposition or to any such adjustment, but, subject to the provisions of Section 9.01, may accept as conclusive evidence of the correctness of any such provisions, and shall be protected in relying upon, an Opinion of Counsel with respect thereto.

SECTION 5.07. The Company covenants that it will at all times reserve and keep available out of its authorized Common Stock, solely for the purpose of issuance upon conversion of Debentures as herein provided, such number of shares of Common Stock as shall then be issuable upon the conversion of all outstanding Debentures. The Company covenants that all shares of Common Stock which shall be so issuable shall, when issued, be duly and validly issued and fully paid and non-assessable.

The Company covenants that, upon conversion of Debentures as herein provided, there will be credited to Common Stock capital account, from the consideration for which the shares of Common Stock issuable upon such conversion are issued, an amount per share of Common Stock so issued as determined by the Board of Directors, which amount shall not be less than the amount required by law and by the Certificate of Incorporation of the Company, as amended, as in effect on the date of such conversion. For the purposes of this covenant the principal amount of the Debentures converted, less the amount of cash paid in lieu of the issuance of fractional shares on such conversion, shall be deemed to be the amount of consideration for which the shares of Common Stock issuable upon such conversion are issued.

SECTION 5.08. The Company covenants that if any shares of Common Stock required to be reserved for purposes of conversion of Debentures hereunder require regis-

tration with or approval of any governmental authority under any Federal or State law before such shares may be issued upon conversion, the Company will in good faith and as expeditiously as possible endeavor to cause such shares to be duly registered or approved, as the case may be. The Company further covenants that, at any time when the Common Stock of the Company is listed on the New York Stock Exchange or any other national securities exchange, the Company will, if permitted by the rules of such exchange, list and keep listed on such exchange, upon official notice of issuance, all shares of Common Stock issuable upon conversion of Debentures.

SECTION 5.09. The issuance of certificates for shares of Common Stock upon the conversion of Debentures shall be made without charge to the converting Debentureholders for any tax in respect of the issuance of such certificates, and such certificates shall be issued in the respective names of, or in such names as may be directed by, the holders of the Debentures converted; *provided, however,* that the Company shall not be required to pay any tax which may be payable in respect of any transfer involved in the issuance and delivery of any such certificate in a name other than that of the holder of the Debenture converted, and the Company shall not be required to issue or deliver such certificates unless or until the person or persons requesting the issuance thereof shall have paid to the Company the amount of such tax or shall have established to the satisfaction of the Company that such tax has been paid.

SECTION 5.10. In case the Company proposes to take any action (other than actions of the character described in clauses (i), (ii) or (iii) of subsection (a) of Section 5.04) which would require an adjustment of the conversion rate pursuant to Section 5.04 or proposes to take any action

of the type specified in Section 5.06, the Company shall give notice to the holders of Debentures at their last addresses as they shall appear upon the register or registers provided for in Section 2.05 at least ten days prior to the applicable record date in the case of action which would require an adjustment of the conversion rate pursuant to Section 5.04 and at least ten days prior to the taking of any action described in Section 5.06, which notice shall state (i) in the case of action requiring an adjustment of the conversion rate pursuant to Section 5.04, the record date as of which such action is to be taken and (ii) in the case of action specified in Section 5.06, the date on which such action is to become effective, and in each case such notice shall describe the action to be taken and, to the extent such effect may be known at the date of such notice, the effect of such action on the conversion ratio and the number, or kind, or class of shares or other securities or property obtainable upon conversion of the Debentures. Failure to give such notice or any defect therein shall not affect the legality or validity of any such action.

SECTION 5.11. The Trustee shall not be accountable with respect to the validity or value (or the kind or amount) of any shares of Common Stock or of any securities or property which may at any time be issued or delivered upon the conversion of any Debentures; and it makes no representation with respect thereto. The Trustee shall not be responsible for any failure of the Company to make any cash payment or to issue, transfer or deliver any shares of Common Stock or stock certificates or other securities or property upon the surrender of any Debenture for the purpose of conversion, or to comply with any of the covenants of the Company contained in this Article Five, all subject to Section 9.01.

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ARTICLE TWELVE
SUPPLEMENTAL INDENTURES

SECTION 12.01. In addition to any supplemental indenture that may be entered into pursuant to the provisions of Section 5.06, the Company, when authorized by a resolution of its Board of Directors, and the Trustee may from time to time and at any time enter into an indenture or indentures supplemental hereto (which shall conform to the provisions of the Trust Indenture Act of 1939 as then in effect) for one or more of the following purposes:

(a) to evidence the succession of another corporation to the Company, or successive successions, and the assumption by the successor corporation of the covenants, agreements and obligations of the Company pursuant to Article Thirteen;

(b) to add to the covenants and agreements of the Company in this Indenture contained such further covenants and agreements thereafter to be observed and to surrender any right or power herein reserved to or conferred upon the Company;

(c) to cure any ambiguity or to correct or supplement any defective or inconsistent provision contained in this Indenture or in any supplemental indenture; and

(d) to make such provisions with respect to matters or questions arising under this Indenture as may be necessary or desirable and not inconsistent with this Indenture; *provided, however*, that such actions shall not adversely affect the interests of the holders of any of the Debentures.

The Trustee is hereby authorized to join with the Company in the execution of any supplemental indenture

authorized or permitted by the terms of this Indenture, and to make any further appropriate agreements and stipulations which may be therein contained, but the Trustee shall not be obligated to enter into any such supplemental indenture which affects the Trustee's own rights, duties or immunities under this Indenture or otherwise.

Any supplemental indenture authorized by the provisions of this Section may be executed by the Company and the Trustee without the consent of the holders of any of the Debentures at the time outstanding.

SECTION 12.02. With the consent (evidenced as provided in Section 10.01) of the holders (or persons entitled to vote or to give consents respecting the same) of not less than 66⅔% in aggregate principal amount of the Debentures at the time outstanding, the Company, when authorized by a resolution of its Board of Directors, and the Trustee may from time to time and at any time enter into an indenture or indentures supplemental hereto (which shall conform to the provisions of the Trust Indenture Act of 1939 as then in effect) for the purpose of adding any provisions to or changing in any manner or eliminating any of the provisions of this Indenture or of any supplemental indenture or of modifying in any manner the rights and obligations of the holders of the Debentures and of the Company; *provided, however*, that no such supplemental indenture shall (i) extend the fixed maturity of any Debentures, or reduce the principal amount thereof, or reduce the rate or extend the time of payment of interest thereon, or reduce any premium payable upon the redemption thereof, or alter or impair the right to convert the same into shares of Common Stock at the rates and upon the terms provided herein, without the consent of the holder of each Debenture so affected, or (ii) reduce the aforesaid percentage of Debentures, the holders of which are required

to consent to any such supplemental indenture, without the consent of the holders of all Debentures then outstanding.

Upon the request of the Company, accompanied by a copy of a resolution of its Board of Directors certified by the Secretary or an Assistant Secretary of the Company authorizing the execution of any such supplemental indenture, and upon the filing with the Trustee of evidence of the consent of Debentureholders as aforesaid, the Trustee shall join with the Company in the execution of such supplemental indenture unless such supplemental indenture affects the Trustee's own rights, duties or immunities under this Indenture or otherwise, in which case the Trustee may, in its discretion, but shall not be obligated to, enter into such supplemental indenture.

It shall not be necessary for the consent of the Debentureholders under this Section to approve the particular form of any proposed supplemental indenture, but it shall be sufficient if such consent shall approve the substance thereof.

Promptly after the execution by the Company and the Trustee of any supplemental indenture pursuant to the provisions of this Section, the Company shall mail, first class postage prepaid, to the holders of Debentures at their last addresses as they shall appear upon the register or registers a notice setting forth in general terms the substance of such supplemental indenture. Any failure of the Company to mail such notice, or any defect therein, shall not, however, in any way impair or affect the validity of any such supplemental indenture.

SECTION 12.03. Upon the execution of any supplemental indenture pursuant to the provisions of this Article Twelve or of Sections 5.06 and 13.01 this Indenture shall be and be deemed to be modified and amended in accordance therewith and the respective rights, limitation of rights, obligations, duties and immunities under this Indenture of the Trustee, the Company and the holders of Debentures shall thereafter be determined, exercised and enforced hereunder subject in all respects to such modifications and amendments, and all the terms and conditions of any such supplemental indenture shall be and be deemed to be part of the terms and conditions of this Indenture for any and all purposes.

SECTION 12.04. Debentures authenticated and delivered after the execution of any supplemental indenture pursuant to the provisions of this Article Twelve or of Sections 5.06 and 13.01, or after any action taken at a Debentureholders' meeting pursuant to Article Eleven, may bear a notation in form approved by the Trustee as to any matter provided for in such supplemental indenture or as to any action taken at any such meeting; and, in such case, suitable notation may be made upon outstanding Debentures after proper presentation and demand. If the Company or the Trustee shall so determine, new Debentures so modified as to conform, in the opinion of the Trustee and the Board of Directors, to any modification of this Indenture contained in any such supplemental indenture, or to any action taken at any such meeting, may be prepared by the Company, authenticated by the Trustee and delivered in exchange for the Debentures then outstanding, upon demand of, and without cost to, the holders thereof, upon surrender of such Debentures.

SECTION 12.05. The Trustee, subject to the provisions of Section 9.01, may receive an Opinion of Counsel as conclusive evidence that any supplemental indenture executed pursuant to this Article Twelve is authorized or permitted by the terms of this Indenture and that it is not inconsistent therewith.

ARTICLE THIRTEEN
CONSOLIDATION, MERGER AND SALE

SECTION 13.01. The Company will not consolidate with, merge into or sell or otherwise dispose of all or substantially all the property of the Company as an entirety to, any person unless (a) the successor formed by or resulting from such consolidation or merger or the person to which such sale or other disposition shall have been made shall be a corporation organized under the laws of the United States of America or any State, district or territory thereof, and (b) such successor corporation (other than the Company) shall expressly assume, by indenture supplemental hereto satisfactory in form to the Trustee, executed and delivered to the Trustee by the corporation formed by such consolidation or into which the Company shall have been merged or by the corporation to which such sale or other disposition shall have been made, the due and punctual payment of the prinicpal of and interest (and premium, if any) on the Debentures according to their tenor, and the due and punctual performance and observance of all the terms, covenants and conditions of this Indenture and the Debentures to be performed or observed by the Company. The Company will not so consolidate or merge, or make any such sale or other disposition, or permit any corporation to merge into the Company, unless immediately after such consolidation, merger, sale or other disposition the Company or such successor corporation, as the case may be, shall not be in default in the performance of any of the covenants, agreements or conditions contained in this Indenture or in the Debentures. Subject to the foregoing provisions of this Section, nothing contained in this Indenture or in any of the Debentures shall prevent any consolidation or merger of the Company with or into any other corporation or corporations (whether or not affiliated with the Company), or

successive consolidations or mergers to which the Company or its successor or successors shall be a party or parties, or shall prevent any sale or other disposition (or successive sales or disposition) of all or substantially all the property and assets of the Company (or its successor or successors) as an entirety, to any other corporation (whether or not affiliated with the Company) lawfully entitled to acquire and operate the same. In the event of any such sale or disposition, the predecessor company may be dissolved, wound up and liquidated at any time thereafter.

SECTION 13.02. In case of any such consolidation, merger, sale or other disposition and upon the execution by the successor corporation of an indenture supplemental hereto, as provided in Section 13.01, and upon compliance by such successor corporation with all applicable provisions of Section 5.06, such successor corporation shall succeed to and be substituted for the Company, with the same effect as if it had been named herein as a party; and any order, certificate, statement, request, instructions, advice or resolutions of the Board of Directors or officers of the Company provided for in this Indenture may be made by like officials of such successor corporation.

Nothing contained in this Indenture or in any of the Debentures shall prevent the Company from acquiring by purchase or by merger or consolidation in which the Company is the surviving corporation, or otherwise, all or any part of the property of any other corporation (whether or not affiliated with the Company).

SECTION 13.03. The Trustee, subject to the provisions of Section 9.01, may receive an Opinion of Counsel as conclusive evidence that any such consolidation, merger, sale or other disposition, and any such assumption and supplemental indenture, complies with the provisions of this Article Thirteen.

Judgment and Order Designating Class Action.

(Filed November 18, 1976)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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74 Civ. 5755 (CES)

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EDWARD BRUCKER and DANIEL R. KAPLAN, as Trustees under the Trust Agreement dated November 15, 1968, made by WILTRUD E. GADBOYS, as Grantor, CECIL G. HUSKEY, W. T. STRATTON and NORTE & CO., a partnership composed of JOSEPH C. GALDI and RITA D. GALDI,

Plaintiffs,

– against –

THYSSEN-BORNEMISZA EUROPE N. V., THYSSEN-BORNEMISZA, INC., THYSSEN-BORNEMISZA HOLDINGS, INC., MARINE MIDLAND BANK, INDIAN HEAD INC., JAMES G. FERGUSON, JAMES M. FLACK, ANDREW KALMAN, PAUL W. McALISTER, JOHN E. O'SULLIVAN, RICHARD J. POWERS, JAMES E. ROBISON, ROBERT M. SCHWARZENBACH, MARSHALL F. SMITH, HERBERT E. BACHRACH, GERARD B. HUISKAMP, WHITE, WELD & CO. INCORPORATED, L. EMERY KATZENBACH, H. H. THYSSEN-BORNEMISZA, R. L. GENILLARD and CHEMICAL BANK,

Defendants.

75 Civ. 229 (CES)

—

WILLIAM B. WEINBERGER,

Plaintiff,

– against –

RICHARD J. POWERS, JAMES M. FLACK, ANDREW KALMAN, PAUL W. McALISTER, JOHN E. O'SULLIVAN, JAMES E. ROBISON, ROBERT M. SCHWARZENBACH, MARSHALL F. SMITH, JAMES G. FERGUSON, THYSSEN-BORNEMISZA, INC. and INDIAN HEAD INC.,

Defendants.

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75 Civ. 1736 (CES)

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SHAMROCK CORPORATION, individually, and on behalf of all holders of Common Stock and Warrants of Indian Head Inc., similarly situated,

Plaintiffs,

– against –

INDIAN HEAD INC.; THYSSEN-BORNEMISZA GROUP N. V.; THYSSEN-BORNEMISZA, INC.; WHITE, WELD & CO. INCORPORATED; RICHARD J. POWERS; JAMES E. ROBISON, HERBERT E. BACHRACH; GERARD B. HUISKAMP; L. EMERY KATZENBACH; MARSHALL F. SMITH; H. H. THYSSEN-BORNEMISZA; R. L. GENILLARD; THYSSEN-BORNEMISZA HOLDINGS, INC. and CHEMICAL BANK,

Defendants.

Judgment and Order.

The proposed settlement of these actions came on to be heard on October 13 and 18, 1976 before the Honorable Charles E. Stewart, Jr., in accordance with the Order of the Court entered August 2, 1976. Upon consideration of the papers submitted and the oral argument by counsel, and a memorandum opinion having been rendered and filed by the Court, November 16, 1976, it is hereby

ORDERED, ADJUDGED AND DECREED THAT:

1. These actions shall proceed as class actions on behalf of all members of each class designated as follows who have not heretofore requested exclusion in accordance with the Order of this Court entered August 2, 1976:

(i) *Common Stock Class.* All owners, beneficially or of record, of $1.00 par value common stock ("Common Stock") of Indian Head as of August 2, 1976 who continue to own such Common Stock on the date of the merger (the "Merger Date") to be effected as provided in the Settlement Agreement;

(ii) *Debenture Owner Class.* All owners, beneficially or of record, of 5½% convertible subordinated debentures due April 15, 1993 of Indian Head ("Debentures") as of August 2, 1976 who continue to own such Debentures on the Merger Date;

(iii) *Debenture Seller Classes.* Former owners, beneficially or of record, of Debentures,

Debenture Seller Class A. All such owners on September 27, 1973 who sold such Debentures between September 27, 1973 and July 1, 1974, inclusive;

Debenture Seller Class B. All such owners on July 2, 1974 who sold such Debentures between July 12, 1974 and August 2, 1976, inclusive;

(iv) *Warrant Owner Classes.* Owners, beneficially or of record, of warrants issued pursuant to the Warrant Agreement dated as of May 15, 1965 between Indian Head and Chemical Bank ("Warrants"), as follows:

Warrant Owner Class A. All such owners as of August 2, 1976 who continue to own such Warrants on the Merger Date;

Warrant Owner Class B. All members of Warrant Owner Class A who were owners of such Warrants on July 2, 1974;

(v) *Warrant Seller Classes.* Former owners, beneficially or of record, of Warrants as follows:

Warrant Seller Class A. All such owners on July 2, 1974 who sold such Warrants between July 12, 1974 and August 2, 1976, inclusive;

Warrant Seller Class B. All such owners who sold such Warrants between August 1, 1973 and July 1, 1974, inclusive.

2. The terms and conditions of the settlement and merger as set forth in the Stipulation and Agreement of Settlement dated July 20, 1976, as amended by the Amendment to Stipulation and Agreement of Settlement dated July 28, 1976 (the "Settlement Agreement"), the original of which has been filed with the Court, are in all respects fair, reasonable and adequate, and are hereby approved by this Court, and shall be consummated as provided in the Settlement Agreement.

3. The three above-captioned actions, the complaints therein and all claims asserted or which might have been asserted therein are hereby dismissed without costs, with prejudice and on the merits against plaintiffs and class

members and in favor of all named defendants, whether or not served with a summons and complaint, including their successors and assigns.

4. Within ten (10) business days after the Merger Date, TBI shall cause to be mailed at its expense, by United States mail, postage prepaid, to each and every member of the Debenture Owner Class and Warrant Owner Classes Transmittal Letters substantially in the form of Exhibit "E" annexed to the Settlement Agreement.

5. Each brokerage firm and financial institution which is or was or whose nominee is or was the record owner of Common Stock, Debentures or Warrants so as to be a member of the Common Stock Class, Debenture Owner or a Warrant Owner Class shall transmit any Transmittal Letters received to the beneficial owners of such Common Stock, Debentures or Warrants who are members of such classes and shall request such additional Transmittal Letters as are necessary to comply with this order.

6. In order to assert a claim to the Debenture Settlement Fund or Warrant Settlement Fund, respectively, provided for in the Settlement Agreement, a member of the Debenture Owner Class or of a Warrant Owner Class shall mail to the Clerk of the United States District Court for the Southern District of New York, P. O. Box 1046, New York, New York 10005, a Transmittal Letter with all attachments required thereby in the manner provided for therein within sixty (60) days after the Merger Date.

7. Marine Midland Bank ("Marine") and Chemical Bank ("Chemical") are hereby appointed to review all Proofs of Claim and Transmittal Letters (together with all documents required thereby) submitted by all members of the Debenture Owner Class and Debenture Seller

Classes and by all members of the Warrant Owner Classes and Warrant Seller Classes, respectively, and the following terms and conditions shall govern:

(a) Marine and Chemical shall, within ninety (90) days after the Merger Date, or such further time as the court may allow, give written notice to Shearman & Sterling and to Austrian, Lance & Stewart, P. C. as to (i) which Proofs of Claim and Transmittal Letters they accept for purposes of payment hereunder and the amount of such payment, (ii) which Proofs of Claim and Transmittal Letters, accepted for payment, have been submitted by persons who, according to written advice from Shearman & Sterling pursuant to subparagraph 4(h) of the Settlement Agreement, have filed or are participating in an appeal or have sought or obtained or are participating in seeking or obtaining an extension of time to appeal from this Judgment and Order or are engaged in any action, suit or proceeding challenging this Judgment and Order and (iii) which Proofs of Claim and Transmittal Letters they do not accept for payment and the reasons therefor;

(b) Marine and Chemical shall make available continuously as received all Proofs of Claim and Transmittal Letters to Shearman & Sterling and Austrian, Lance & Stewart, P. C., for their inspection, and shall fully cooperate with both firms in any inquiries they may make;

(c) Within thirty (30) days after receipt of notice pursuant to subparagraph (a) above, Shearman & Sterling and Austrian, Lance & Stewart, P. C., shall confer with Marine and Chemical and with each other in an attempt to resolve any dispute that may

arise concerning such Proofs of Claim or Transmittal Letters and, in the event that such dispute cannot be so resolved within such thirty (30) day period, the objecting party shall submit such objection to the Court for resolution;

(d) As to all Proofs of Claim and Transmittal Letters to which no objection is made in the manner provided above, within ten (10) days after the conference referred to in subparagraph (c) above, but in any event not longer than forty (40) days after the date of notice pursuant to subparagraph (a) above, Marine and Chemical shall make payment in accordance with the provisions of the Debenture Escrow Agreement and Warrant Escrow Agreement, respectively, to all class members whose Proofs of Claim and/or Transmittal Letters are accepted for payment and shall withhold payment to any and all persons described in subparagraph 7(a)(ii) hereof until they receive written advice from Shearman & Sterling pursuant to subparagraph 4(h) of the Settlement Agreement, and shall, from time to time, promptly make payment to those persons whose Proofs of Claim and/or Transmittal Letters are no longer the subject of dispute (i) pursuant to written advice to such effect by Shearman & Sterling and Austrian, Lance & Stewart, P. C. or (ii) pursuant to a duly entered order of the Court resolving such a dispute.

8. All plaintiffs and class members and their heirs, executors, administrators, personal representatives, successors and assigns are hereby permanently enjoined from prosecuting any individual, class or derivative claims arising out of or relating to the matters set forth in the complaints, including any claim related to the consummation of the merger, other than a proceeding for appraisal pursuant to Section 262 of the Delaware General Corporation Law, against any of the named defendants whether or not served with a summons and complaint, their personal representatives, trustees, heirs and assigns and, as to the corporate defendants, in addition, their predecessors, successors, parents, subsidiaries, affiliates and present or former directors, officers, employees, attorneys and agents or against any other person; and permanently enjoining all members of the Common Stock Class from prosecuting any derivative claims arising out of or relating to said matters.

9. Jurisdiction is hereby retained by this Court for the purpose of entering such further orders as may be necessary or appropriate in administering or effectuating the provisions of the Settlement Agreement, including the application by the attorneys for the classes for attorneys' fees and disbursements as set forth in the Settlement Agreement.

Dated: New York, New York
November 18, 1976

CHARLES E. STEWART, JR.
U. S. D. J.

JUDGMENT ENTERED
November 18, 1976

RAYMOND F. BURGHARDT
Clerk

APPENDIX B.

—

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

———

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of May, one thousand nine hundred and seventy-seven.

Present: HON. WILLIAM H. TIMBERS

HON. ELLSWORTH A. VANGRAAFEILAND
Circuit Judges

HON. RICHARD OWEN
District Judge

—

76-7578

—

Edward Brucker and Daniel R. Kaplan, as Trustees under the Trust Agreement dated November 15, 1968 made by Wiltrud E. Gadboys, as Grantor, Cecil G. Huskey, E. T. Stratton and Norte & Co., a partnership composed of Joseph C. Galdi and Rita D. Galdi,

Plaintiffs,

v.

Indian Head, Inc., Thyssen-Bornemisza Europe N. V., Thyssen-Bornemisza, Inc., Thyssen-Bornemisza Holdings, Inc., Marine Midland Bank, James G. Ferguson, James M. Flack, Andrew Kalman, Paul W. McAlister, John E. O'Sullivan, Richard J. Powers, James E. Robison, Robert M. Schwarzenbach, Marshall F. Smith, Herbert E. Bachrach, Gerard B. Huiskamp, White, Weld & Co., Incorporated, L. Emery Katzenbach, H. H. Thyssen-Bornemisza, R. L. Genillard and Chemical Bank,

Defendants.

William B. Weinberger,

Plaintiff,

v.

Richard J. Powers, James M. Flack, Andrew Kalman, Paul W. McAlister, John E. O'Sullivan, James E. Robison, Robert M. Schwarzenbach, Marshall F. Smith, James G. Ferguson, Thyssen-Bornemisza, Inc., and Indian Head, Inc.,

Defendants.

Shamrock Corporation, individually and on behalf of all holders of Common Stock and Warrants of Indian Head, Inc., similarly situated,

Plaintiffs,

v.

Indian Head, Inc., Thyssen-Bornemisza Group N. V., Thyssen-Bornemisza, Inc., White, Weld & Co., Incorporated, Richard J. Powers, James E. Robison, Herbert E. Bachrach, Gerard B. Huiskamp, L. Emery Katzenbach, Marshall F. Smith, H. H. Thyssen-Bornemisza, R. L. Genillard, Thyssen-Bornemisza Holdings, Inc., and Chemical Bank,

Defendants.

Morton P. Rome and Marjorie T. Rome, trustees under Trust Agreement made November 22, 1954 for the benefit of Sally P. Rome,

Objectors-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Order.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk.

by ARTHUR HELLER,
Arthur Heller,
Deputy Clerk.

APPENDIX C.

Fifth Amendment to the Constitution of the United States.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Rules Enabling Act, 28 U. S. C. § 2072.

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the

beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way, limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

Section 10(b) of the Securities Exchange Act of 1934; 15 U. S. C. § 78j(b).

Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5—17 C. F. R. § 240.10b-5.

Employment of Manipulative and Deceptive Devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

General Corporation Law of the State of Delaware, Del. Code Ann. Tit. 8, § 259

§ 259. *Status, rights, liabilities, etc., of constituent and surviving or resulting corporations following merger or consolidation*

(a) When any merger or consolidation shall have become effective under this chapter, for all purposes of the laws of this State the separate existence of all the constituent corporations, or of all such constituent corporations except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease and the constituent corporations shall become a new corporation, or be merged into one of such corporations, as the case may be, possessing all the rights, privileges, powers and franchises as well of a public as of a private nature, and being subject to all the restrictions, disabilities and duties of each of such corporations so merged or consolidated; and all and singular, the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due to any of said constituent corporations on whatever account, as well for stock subscriptions as all other

things in action or belonging to each of such corporations shall be vested in the corporation surviving or resulting from such merger or consolidation; and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the surviving or resulting corporation as they were of the several and respective constituent corporations, and the title to any real estate vested by deed or otherwise, under the laws of this State, in any of such constituent corporations, shall not revert or be in any way impaired by reason of this chapter; but all rights of creditors and all liens upon any property of any of said constituent corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

(b) In the case of a merger of banks or trust companies, without any order or action on the part of any court or otherwise, all appointments, designations, and nominations, and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, trustee of estates of persons mentally ill and in every other fiduciary capacity, shall be automatically vested in the corporation resulting from or surviving such merger; provided, however, that any party in interest shall have the right to apply to an appropriate court or tribunal for a determination as to whether the surviving corporation shall continue to serve in the same fiduciary capacity as the merged corporation, or whether a new and different fiduciary should be appointed.

Rule 23—Federal Rules of Civil Procedure.

CLASS ACTIONS.

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion, may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule

16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

As amended Feb. 28, 1966, eff. July 1, 1966.

Rule 65—Federal Rules of Civil Procedure.

INJUNCTIONS

(a) *Preliminary Injunction.*

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) *Temporary Restraining Order; Notice; Hearing; Duration.* A temporary restraining order may be granted without written or oral notice to the adverse party or his

attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and take precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) *Security.* No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(d) *Form and Scope of Injunction or Restraining Order.* Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) *Employer and Employee; Interpleader; Constitutional Cases.* These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U. S. C., § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U. S. C., § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges.

Rule 82—Federal Rules of Civil Procedure.

JURISDICTION AND VENUE UNAFFECTED.

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U. S. C. §§ 1391-93.

As amended Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966.

Supreme Court, U. S.
FILED
SEP 19 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

October Term 1977

No. 77-185

MORTON P. ROME and MARJORIE T. ROME,
Trustees Under A Trust Agreement,

Petitioners,

v.

INDIAN HEAD INC. et al.,

Respondents.

PETITION for a WRIT OF CERTIORARI to THE UNITED STATES COURT OF APPEALS for THE SECOND CIRCUIT.

BRIEF FOR DEFENDANTS-RESPONDENTS IN OPPOSITION.

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Dated: September 19, 1977

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BRIEF FOR DEFENDANTS-RESPONDENTS IN OPPOSITION.

Defendants-respondents submit this brief in opposition to the petition for a writ of certiorari. We do not take issue with the petitioners' references to the "Opinions Below" (Petition, p. 1) or their statement of the basis for the Court's Jurisdiction (Petition, p. 2). We do not believe that petitioners' statement of "Questions Presented for Review" raises any question reviewable by the Court.

COUNTER-STATEMENT OF THE CASE

We refer to and rely for our Statement of the Case upon the district court's thorough exposition of the facts concerning this litigation and its settlement. Petition, Appendix A1-10 (hereinafter "A___"). We will not repeat those facts, but will comment on petitioners' misstatements of them and will summarize the proceedings subsequent to the district court's approval of the settlement.

Under the Stipulation and Agreement of Settlement (the "Settlement Agreement"), Thyssen-Bornemisza Inc. ("TBI") agreed to make cash payments to members of classes of former owners of convertible subordinated debentures ("Debentures") and warrants to purchase common stock ("Warrants") of Indian Head Inc., and to all owners of Indian Head common stock ("Common Stock"), Debentures and Warrants who owned their securities both as of the date of the Court's order of August 2, 1976 directing notice to the classes and the date of the proposed merger of Indian Head into a subsidiary of TBI, Thyssen-Bornemisza Holdings Inc. ("TBH"). In return, all claims asserted or encompassed in the three complaints would be dismissed and barred and the merger would be allowed to proceed.

Petitioners attempt to mislead the Court (Petition, pp. 8-9) by misrepresenting and obfuscating the provisions for class representation contained in the district court's order of August 2, 1976 (the "Order"), a copy of which accompanies this Brief as Appendix I. In fact, plaintiffs Brucker and Kaplan (*Brucker* action), as owners of Debentures, represented the Debenture Owner Class, together with plaintiff Weinberger (*Weinberger* action), who, as a Debenture seller, also represented the Debenture Seller Classes. Such combined representation was appropriate because plaintiffs in both the *Brucker* and *Weinberger* actions asserted claims on behalf of both present and former owners of Debentures and had done so in litigation pending for more than two years at the time of the settlement.

The Order directed the mailing and publication of a "Notice of Indian Head Inc. Class Actions, Proposed Settlement and Hearing" (the "Notice") and directed that a hearing be held on October 13, 1976 to consider whether the settlement should be approved under Rule 23(e) of the Federal Rules of Civil Procedure. Pursuant to the Order, the Notice was mailed to all class members who could be identified from Indian Head records and was also published on a nationwide basis. The Notice described the litigation and the terms of the settlement[1] and informed class members of their rights to obtain additional information and to request exclusion or appear and show cause at the hearing set for October 13, 1976 why the settlement should not be approved. A copy of the Notice is appended hereto as Appendix II.

On September 27, 1976, petitioners filed a notice of intention to appear together with numerous objections to the proposed settlement.[2] Petitioners vigorously opposed the proposed settlement as unfair to Debenture owners only. They filed a lengthy memorandum raising numerous arguments, most of which, except for those made in Point

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[1] The first amended complaint in *Brucker* had been mooted by withdrawal of the February 11 merger proposal. The second amended complaint prayed for a permanent injunction against any future merger between Indian Head and TBI or its affiliated companies. It was served on the defendants prior to the filing of the Settlement Agreement on July 20, 1976. An apparent delay in recording the filing of the second amended complaint on the court docket until July 26 seems to have led petitioners into the absurdity that the second amended complaint impeached the validity of the Settlement Agreement. *See* Petition, p. 9.

[2] Another Debenture owner represented by counsel for the petitioners submitted a request for exclusion and subsequently brought a separate action incorporating many of the claims in *Brucker* and in the petitioners' arguments as objectors to the settlement. That Debenture owner claims to own $5,000 principal amount of Debentures.

Three other persons owning an aggregate of $27,000 principal amount of Debentures also requested exclusion. None has commenced an action. Thus, four persons owning a total of $32,000 in Debentures requested exclusion, out of an aggregate outstanding principal amount on August 2, 1976 of $14,291,000.

III of the Petition (pp. 24-29), have now been abandoned. The principal arguments made in Points I and II, however, were not raised below. Petitioners did not challenge the absence of findings to support the preliminary class action determinations made in the Order, nor did they assert that Rule 23 violates the Constitution by requiring class members to opt out or become "involuntary plaintiffs" in a foreign jurisdiction.

After hearing petitioners' arguments on October 13, 1976, the district court continued the hearing on October 18, 1976 to permit petitioners to complete their presentation. All of the objections raised by petitioners were rejected in that court's detailed decision rendered on November 16, 1976 (A13-23).

A judgment and order approving the settlement was entered on November 18, 1976 (the "Judgment") (A42). The court confirmed the class action determinations and the definitions of each of the classes to which the Notice had been sent pursuant to the Order. Thereafter, petitioners filed motions to alter or amend the Judgment, for a "partial" stay pending appeal and to supplement the record, but did not assert that the court should have made specific findings in support of the class determinations (either in the Order or the Judgment) nor did they assert that the procedure authorized by Rule 23 violated due process by subjecting them to the jurisdiction of the district court. After a hearing on November 29, 1976, Judge Stewart denied each of the motions. Petitioners filed a notice of appeal from the Judgment the same day.

On November 30, 1976, in accordance with the Settlement Agreement and the Judgment, Indian Head was merged into TBH, and on December 2, 1976, TBI paid $12,100,000 into the Debenture Settlement Fund and $1,450,000 into the Warrant Settlement Fund pursuant to the Settlement Agreement. Notice of the merger and a letter of transmittal were sent to all Common Stock owners informing them of

their rights to receive $32 per share under the Settlement Agreement and Delaware law. Similar notices and letters of transmittal were sent to all Debenture and Warrant owners informing them of their rights to receive the benefits of the settlement.

Petitioners' appeal to the Court of Appeals for the Second Circuit was heard on May 2, 1977. That court affirmed the district court's judgment from the bench at the close of oral argument. An order of affirmance was entered the same day. Again, petitioners did not argue before the Court of Appeals that the district court had failed to make findings in support of the class determinations in the Order or that Rule 23 unconstitutionally expanded the district court's jurisdiction.

Subsequent events have rendered petitioners' case moot. In addition to the completed merger of Indian Head and TBH, which petitioners ask this Court to undo, substantially all of the payments to class members have been made. As of August 1, 1977, there had been submitted pursuant to the settlement $12,178,000 in principal amount of Debentures (out of $14,291,000 outstanding as of August 2, 1976) for payment of $851.65 per $1,000; 564,683 shares of Common Stock (out of 585,878 outstanding as of August 2, 1976) for payment of $32 per share; and 316,480 Warrants (out of 349,467 publicly outstanding as of August 2, 1976) for payment of $4.00 or $2.50 per Warrant, as appropriate. As of August 1, 1977, a total of $29,877,396.87 had been paid to class members in accordance with the settlement terms. Moreover, although the Settlement Agreement preserved the appraisal rights of Common Stock owners on the merger date, holders of only 132 shares requested appraisal, but none commenced an appraisal proceeding before the Delaware Court of Chancery.

ARGUMENT

This litigation involves only the question whether the district court properly exercised its discretion under Rule 23(e) of the Federal Rules of Civil Procedure to approve the settlement of two class actions[3] brought under Rule 23(a) and (b)(3), and no amount of acrobatic rhetoric can convert that issue into one worthy of consideration by this Court.

Rule 23(c) commands the district court to determine whether an action under Rule 23(b)(3) shall be maintained as a class action and to insure that identifiable class members receive individual notice of the pendency of the action, of their rights to appear and be heard or to request exclusion from the class, and that any judgment in the action will include all class members who do not request exclusion. *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974). Rule 23(e) requires that the class members receive notice of a proposed settlement. In its August 2, 1976 Order, the district court directed that a combined Rule 23(c) and (e) notice be mailed to all owners and former owners of Indian Head Common Stock, Debentures and Warrants who were included within the classes. That was done.

Rule 23(e) also requires that the district court determine whether the settlement should be approved. Approval is committed to the discretion of the district court and may be granted only after the court has evaluated the strength of the plaintiff's claims and weighed them against the benefits to be derived from the settlement. *Newman* v. *Stein,* 464

[3] Since petitioners could not and do not challenge the merger or the settlement insofar as either affects the class of Warrant owners, they do not address the propriety of settling the *Shamrock* action. Nor do they make any claim on behalf of the class of Common Stock owners (represented in *Brucker* and *Shamrock*) or on behalf of the classes of former Debenture owners (represented in *Brucker* and *Weinberger*). Nevertheless, were petitioners to obtain the relief they seek, the effect would be rescission of the entire settlement to the detriment of the Indian Head securities owners and former owners in those classes.

F.2d 689 (2d Cir.), *cert. denied,* 409 U.S. 1039 (1972); *West Virginia* v. *Chas. Pfizer & Co.,* 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd,* 440 F.2d 1079 (2d Cir.), *cert. denied,* 404 U.S. 871 (1971); *City of Detroit* v. *Grinnell Corporation,* 495 F.2d 448 (2d Cir. 1974); *Ace Heating & Plumbing Company* v. *Crane Company,* 453 F.2d 30 (3d Cir. 1971). The district court's thorough decision after a full hearing (A1-23) easily met that standard,[4] as the Court of Appeals for the Second Circuit confirmed by affirming the decision below, from the bench, without opinion.

Only four Debenture owners requested exclusion.[5] Only petitioners served objections. They fully briefed their arguments and reiterated them in hearings before the district court on October 13 and 18, 1976. In short, this settlement complied with all of the procedural and substantive requirements of due process and Rule 23. *See Hansberry* v. *Lee,* 311 U.S. 32 (1940); *Eisen* v. *Carlisle & Jacquelin,* 391 F.2d 555 (2d Cir. 1968). *Cf. Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950).

There is no basis for review by this Court.

I.

There is No Conflict Among the Circuit Courts of Appeals.

A. Express findings with respect to the class action criteria of Rule 23(a) and (b) are not required for approval of a settlement under Rule 23(e).

Petitioners argue in this Court, *for the first time* in this litigation, that the August 2, 1976 Order (Appendix I hereto)

[4] As the district court noted (A8), the decision to settle this litigation was based chiefly on the potentially adverse precedents established in *Marshel* v. *AFW Fabric Corp.,* 533 F.2d 1277 (2d Cir. 1976), and *Green* v. *Santa Fe Industries, Inc.,* 533 F.2d 1283 (2d Cir. 1976). This Court vacated the decision in *Marshel* as moot, 429 U.S. 881 (1976), and resoundingly reversed *Green,* .. U.S. ..., 51 L. Ed. 2d 480 (Mar. 23, 1977). In March 1976, however, such an outcome could hardly have been described as certain, even if TBI's business decisions concerning the merger could have been held in abeyance for a year.

[5] Those four owned only $32,000 in principal amount of Debentures. See footnote 2, *supra.*

did not contain specific findings that the classes certified by the district court met the criteria of Rule 23(a) and (b). Petition, pp. 8, 16. Their failure to raise that argument below is sufficient ground for the Court to disregard it. *Brown* v. *United States,* 411 U.S. 223, 230 n.4 (1973); *Lawn* v. *United States,* 355 U.S. 339, 362 n.16 (1958); *California* v. *Taylor,* 353 U.S. 553, 557 n.2 (1957).

The supposed conflict of decisions among the Circuits raised by petitioners is a frivolous concoction. Petitioners claim to discern a conflict between the decisions of the Third and Ninth Circuits on the necessity for findings with respect to a class determination and, citing only a district court decision, claim that the Second Circuit agrees with the Third that such findings are not required. Petition, pp. 13-14. Whether the Third and Ninth Circuits are in conflict is not a matter for resolution in this case. The only relevant conflict would be one between the Second and Ninth Circuits, but, because the issue now raised by petitioners was not presented below, the Second Circuit's affirmance here cannot be taken as a statement of opinion either for or against requiring express findings with respect to class certification under Rule 23(a) and (b). Consequently, petitioners have not presented any evidence of a conflict between the Second and Ninth Circuits. Moreover, even if one credits petitioners' unfounded assumption that the Second Circuit "approved" the absence of such findings in the present case, the supposed conflict with the Ninth Circuit evaporates upon analysis of the applicable decisions.

Petitioners contend that *Price* v. *Lucky Stores, Inc.,* 501 F.2d 1177 (9th Cir. 1974), mandates formal findings of fact in support of every class action determination. In fact, the Ninth Circuit first held that an order *denying* class action status was appealable under 28 U.S.C. § 1292(a)(1) when the complaint sought broad injunctive relief against the defendants. 501 F.2d at 1179. Then, referring to the Tenth Circuit decision in *Wilcox* v. *Commerce Bank,* 474 F.2d 336, 345 (10th Cir. 1973), the court held that a "bare record of complaint, answer and motion to dismiss" was insufficient

to permit review on appeal, and that an "adequate record" and findings "keyed" to the requirements of Rule 23 were necessary.[6] 501 F.2d at 1179. *Accord, Clark* v. *Watchie,* 513 F.2d 994 (9th Cir.), *cert. denied,* 423 U.S. 841 (1975).

Price is simply inapposite. The Order did not deny certification of the classes; it allowed definition of the classes for purposes of settlement. Both the Second and Ninth Circuits agree that in a settlement context it is unnecessary to make specific findings to show the existence of class action prerequisites under Rule 23(a) and (b); rather, the Court must make adequate findings under Rule 23(e) to demonstrate why the settlement should be approved.[7]

In *Mandujano* v. *Basic Vegetable Products, Inc.,* 541 F.2d 832, 835-36 (9th Cir. 1976), which was overlooked or ignored by petitioners, the Ninth Circuit did not question the district court's approval of classes defined for settlement purposes,[8] holding only that the district court must "review carefully" and give a "reasoned response" to objections raised to the settlement before it can approve a proposed

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[6] Rule 23(b) permits a class action to be maintained if the prerequisites of Rule 23(a) are satisfied and if

> "(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. . . ."

Fed. R. Civ. Proc. 23(b), 28 U.S.C. The Rule then sets out various matters pertinent to the "findings". *Id.*

[7] Rule 23(e) provides:

> "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

[8] In addition to their argument about findings, petitioners also challenge the district court's approval of classes certified for settlement purposes and cite, among other authorities, *City of Detroit* v. *Grinnell Corporation,* 495 F.2d 448 (2d Cir. 1974). Petition, pp. 17-18. *Grinnell* is clear authority *contra* petitioners' argument and was relied upon by the district court in approving the settlement classes (A14). See pp. 10-11 *infra.*

settlement pursuant to Rule 23(e). In particular, the notice to the classes required by Rule 23(e)

> "must indicate that a member of the class can object to the proposed settlement as well as to the manner in which the class is defined. Each objection so made must become a part of the record of the case. The trial court before approving a proposed settlement must review carefully these objections. Those determined to be substantial cannot be rejected without an opportunity being afforded the objector to be heard. To assure an adequate hearing the trial court should not hesitate to permit an attorney of the objector's choosing to appear at the hearing and to represent the objector [footnote omitted] ....
>
> "The hearing which an objection of substance makes necessary must be sufficient to enable the trial court to set forth on the record a reasoned response thereto. Such findings of fact and conclusions of law as may be necessary to support the response must also appear on the record [footnote omitted]." *Id.* at 835-36.

The Second Circuit has also determined that classes may be certified for purposes of settlement and that the determination of whether a class action should be maintained in a settlement context is committed to the discretion of the district court. In *City of Detroit* v. *Grinnell Corporation*, 495 F.2d 448 (2d Cir. 1974), the court reaffirmed the principle that appellate intervention in a Rule 23(e) settlement would occur only upon "a clear showing that the District Court has abused its discretion." *Id.* at 455. Specifically addressing the propriety of defining classes for purposes of settlement, the court found such a procedure proper when the settlement had not been negotiated at a "premature" stage in the dispute, when the class members had received "notice of a hearing and an opportunity to challenge the fairness of the proposed settlement" and when there had not been a contest among putative class

representatives for designation as class representative. *Id.* at 466. The district court in this litigation addressed those questions and determined that all of the *Grinnell* tests for approval of settlement classes had been satisfied (A13-14).

All of the procedures discussed in *Mandujano* and *Grinnell* were followed in this case.[9] Each of the petitioners' objections was considered by the district court, whose findings of fact and conclusions of law were set forth in its lengthy memorandum decision, in conformity with the requirements of Rule 52(a). The district court reviewed the events which gave rise to the litigation (A3-7), the claims asserted by each of the classes (A7, A8), the legal issues involved (A12) and the reasons why the Debenture classes were properly defined[10] and adequately represented (A14-17). Not only is there no conflict between the Circuits, but the requirements of Rule 23 as interpreted in the relevant decisions (those dealing with class action settlements) in both Circuits were adhered to by the district court.

B. The law of adequacy of representation in a class action settlement is clear under both Rule 23 and the Constitution.

Petitioners have misstated the facts concerning plaintiffs' representation of the Debenture classes. Plaintiffs Brucker and Kaplan (*Brucker* action) had vigorously pros-

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[9] Moreover, *Price* v. *Lucky Stores*, relied upon by petitioners, does not establish a contrary principle. *Price* requires findings so that a denial of class certification can adequately be reviewed on appeal; *Mandujano* requires a "reasoned response" to objections so that they can adequately be reviewed on appeal. Although *Price* does not apply in a settlement context, the preservation of an objector's right to appeal under *Mandujano* and *Grinnell* is in accord with the policy underlying *Price*.

[10] *Compare Kremens* v. *Bartley*, . . . U.S. . . ., 45 U.S.L.W. 4451 (May 16, 1977), where the district court ignored the difference in treatment accorded to various class members under state administrative regulations and certified a single class. Petitioners' reliance on that case and like cases (Petition, p. 16) is frankly mystifying.

ecuted their case for more than two years at the time settlement was achieved (p. 2 *supra* and A7-8). Absent members of the Debenture classes had no cause to complain (*see* footnote 2 *supra*), as the district court found in approving the settlement under Rule 23.

Nevertheless, petitioners raise a Constitutional challenge to the adequacy of representation of the Debenture owner class. Petition, pp. 15-18. The Court has refused to consider this proposition at least once before. *In re Four Seasons Securities Laws Litigation*, 502 F.2d 834 (10th Cir.), *cert. denied*, 419 U.S. 1034 (1974).

Where notice of the class action and of the terms of the proposed settlement is accompanied by notice of the right to opt-out of the designated classes, there is no infringement of due process even if adequacy of representation by the class representatives could be shown to be lacking. In the *Four Seasons* class action, the Tenth Circuit, upon considering a motion for relief from judgment on the ground of inadequate representation, concluded that:

> "[D]ue process was satisfied here when [movant] received the notice and order delineating the terms of the proposed settlement and informing [it] that it was a designated member of a class, that it had the opportunity to opt out or be represented by counsel, that it would be bound if it failed to opt out. In such a case, we conclude that *due process may be satisfied by notice alone* and that, where due process is thus satisfied, adequacy of representation need not be shown as a matter of constitutional necessity." 502 F.2d at 843 (emphasis supplied).

Of course, petitioners actually appeared in this litigation, filed objections and participated in hearings on the settlement. They cannot assert a violation of due process as to them, *Hansberry* v. *Lee*, 311 U.S. 32, 42-43 (1940), and they lack standing to claim violations of due process as to

the other class members, who chose to accept the benefits of the settlement and whose interests are therefore inimical to those asserted by petitioners. *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974); *O'Shea* v. *Littleton*, 414 U.S. 488 (1974); *Bailey* v. *Patterson*, 369 U.S. 31 (1962); *Tileston* v. *Ullman*, 318 U.S. 44 (1943).

This is clearly not a case where the "great gravity and delicacy" of the Constitutional question justifies review. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring).

II.

This Case Does Not Present Any Important Federal Question.

A. Rule 23 does not expand the jurisdiction of the federal district courts.

Petitioners assert that the notice and "opt-out" provisions of Rule 23(c) fail to comply with the requirements of the due process clause of the Fifth Amendment for assertion of jurisdiction *in personam* and also violate Rule 82 and the Rules Enabling Act, 28 U.S.C. § 2072 (1958). Petition, pp. 19, 24. Petitioners apparently believe that not only was *this* class action settlement improper, but that *any* such settlement is improper. Those issues, like petitioners' arguments with respect to findings, were not raised by petitioners in, or addressed by, the courts below. For the reasons set forth in Point IA above, the Court should not consider them now.

1. Due process is afforded.

As discussed under Point IB above, any Constitutional issue as to the due process adequacy of the opt-out procedure under Rule 23(c) was laid to rest in *In re Four Seasons Securities Laws Litigation*, 502 F.2d 834 (10th Cir.), *cert. denied*, 419 U.S. 1034 (1974). Petitioners' entire argument to the contrary is based only on the chain of precedent establishing that due process limits the power

of a court to compel a foreign defendant to stand trial. Petition, pp. 19-24. Petitioners' cases have nothing to do with a procedural mechanism allowing a plaintiff class member to benefit from an action litigated by his representatives.

2. There is no violation of Rule 82 or the Rules Enabling Act.

Petitioners' argument that Rule 23 improperly expands the jurisdiction of the federal courts in violation of Rule 82 and the Rules Enabling Act, 28 U.S.C. § 2072 (Supp. 1977), is novel only in the sense that, like many of petitioners' previous arguments, it was not raised below and should be disregarded. Even if considered, however, it does not raise any issue for decision.[11]

As the Court held in *Hanna* v. *Plumer,* 380 U.S. 460, 471 (1965), each Federal Rule carries with it the "prima facie judgment" of "the Advisory Committee, this Court, and Congress . . . that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions" (footnote omitted).

The Court has never invalidated one of the Federal Rules of Civil Procedure. In an unbroken line of decisions, this Court has rejected every attempt to invalidate a Federal Rule as in violation of the Enabling Act. *Hanna* v. *Plumer, supra; Schlagenhauf* v. *Holder,* 379 U.S. 104 (1964); *Mississippi Publishing Corp.* v. *Murphree,* 326 U.S. 438 (1946); *Sibbach* v. *Wilson & Co.,* 312 U.S. 1 (1941).

Those decisions make plain that a Federal Rule is valid under the Enabling Act so long as it does not change the rules of decision by which the Court adjudicates the rights of the parties. *Mississippi Publishing Corp.* v. *Murphree, supra,* 326 U.S. at 446. This is so even though the Rule may have a substantial impact upon the litigants or the outcome of the litigation.

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[11] The Act provides that federal rules promulgated thereunder "shall not abridge, enlarge or modify any substantive right". 28 U.S.C. § 2072 (Supp. 1977).

In *Sibbach* v. *Wilson & Co., supra,* 312 U.S. at 14, the Court stated:

> "The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."

In *Mississippi Publishing Corp.* v. *Murphree, supra,* 326 U.S. at 445-46 (1946), the Court authoritatively rejected broad arguments that would hamstring the courts and call into question many of the Federal Rules of Civil Procedure:

> "Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants. Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights. Sibbach v. Wilson & Co., 312 U.S. 1, 11-14. The fact that the application of Rule 4(f) will operate to subject petitioner's rights to adjudication by the district court for Northern Mississippi will undoubtedly affect those rights. But it does not operate to abridge, enlarge or modify the rules of decision by which that court will adjudicate its rights. It relates merely to 'the manner and the means by which a right to recover . . . is enforced.' "

Under the foregoing decisions, Rule 23(c) is plainly within the Supreme Court's Enabling Act authority, since it in no way modifies rules of decision, and since it relates solely "to the manner and means by which a right to recover . . . is enforced."

Finally, the validity of Rule 23 was before the Court in *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974). Both the

defendants and the American College of Trial Lawyers (as *amicus curiae*) argued that maintenance of that case as a class action violated the Enabling Act. The Court implicitly rejected that argument in vacating the Circuit Court's decision and allowing the case to proceed on behalf of any smaller subclass that plaintiff could afford to notify. The opinion, which focused directly upon the mandatory individual notice requirement of Rule 23(c)(2), observed that such notice is:

> "... an unambiguous requirement ... intended to insure that the judgment, whether favorable or not, would bind all class members who did not request exclusion from the suit." *Id.* at 176.

B. The Court should not review questions of contract interpretation.

Distilled, petitioners' third point is only that the lower courts failed to agree with petitioners' interpretation of the Indenture governing the rights of the Debenture owners. Petition, p. 26. Such a question is normally not one that the Court will consider on certiorari. *United States* v. *Johnson*, 268 U.S. 220, 227 (1925). *See also Berenyi* v. *District Director*, 385 U.S. 630, 635 (1967); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949), *on reh'g*, 339 U.S. 605 (1950).

Even if the Court were to take jurisdiction, it would have to disregard the plain language of Section 5.06 of the Indenture, discussed in the district court's memorandum decision (A15-17), and it would have to overrule the clear logic of *Broenen* v. *Beaunit Corporation*, 440 F.2d 1244 (7th Cir. 1970), a virtually indistinguishable case upon which the district court relied.

Finally, as an apparent afterthought, petitioners attack the injunction against future suits by class members based upon the same matters as were raised in the complaints. Petition, pp. 27-28. This specious objection has been rejected by several district courts, *e.g.*, *Fox* v. *Glickman Corporation*, 253 F. Supp. 1005, 1013 (S.D.N.Y. 1966); *Cherner* v. *Transitron Electronic Corporation*, 221 F. Supp. 48, 53 (D. Mass. 1963), and should not occupy the Court. Petitioners' contention (Petition, p. 28) that the injunction bars generally a suit to enforce a Debenture owner's rights under the Indenture, as distinguished from a suit to relitigate the specific claims encompassed in the settlement of this litigation, is nearly as foolish as their hyperbolic predictions of doom for the convertible debenture owners of the world.

III.

This Case is Moot.

Although petitioners continue their lonely challenge to the settlement of these class actions, nearly all other class members have accepted the benefits. Over $29,000,000 has been paid out to class members, and about 90% of petitioners' fellow Debenture owners have exchanged their Debentures for cash. The first anniversary of the merger between Indian Head and Thyssen-Bornemisza Holdings, Inc. is approaching. Even were it warranted, granting petitioners' demands that the Judgment be vacated and the Debenture owners returned to the *status quo ante* would be a sterile exercise in absurdity. Where events have occurred, in the absence of an injunction, which effectively preclude restoration of the prior circumstances, this Court has refused to consider granting the relief sought by the writ. *Mills* v. *Green*, 159 U.S. 651, 653 (1895). *See also Securities and Exchange Commission* v. *Medical Committee For Human Rights*, 404 U.S. 403 (1972); *Alton* v. *Alton*, 347 U.S. 610 (1954).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 19, 1977.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDWARD BRUCKER and DANIEL R. KAPLAN, as Trustees under the Trust Agreement dated November 15, 1968, made by WILTRUD E. GADBOYS, as Grantor, CECIL G. HUSKEY, W. T. STRATTON and NORTE & Co., a partnership composed of JOSEPH C. GALDI and RITA D. GALDI, *Plaintiffs,* —*against*— THYSSEN-BORNEMISZA EUROPE N.V., THYSSEN-BORNEMISZA, INC., THYSSEN-BORNEMISZA HOLDINGS, INC., MARINE MIDLAND BANK, INDIAN HEAD INC., JAMES G. FERGUSON, JAMES M. FLACK, ANDREW KALMAN, PAUL W. McALISTER, JOHN E. O'SULLIVAN, RICHARD J. POWERS, JAMES E. ROBISON, ROBERT M. SCHWARZENBACH, MARSHALL F. SMITH, HERBERT E. BACHRACH, GERARD B. HUISKAMP, WHITE, WELD & Co. INCORPORATED, L. EMERY KATZENBACH, H. H. THYSSEN-BORNEMISZA, R. L. GENILLARD and CHEMICAL BANK, *Defendants.*	74 Civ. 5755 (CES)
WILLIAM B. WEINBERGER, *Plaintiff,* —*against*— RICHARD J. POWERS, JAMES M. FLACK, ANDREW KALMAN, PAUL W. McALISTER, JOHN E. O'SULLIVAN, JAMES E. ROBISON, ROBERT M. SCHWARZENBACH, MARSHALL F. SMITH, JAMES G. FERGUSON, THYSSEN-BORNEMISZA, INC. and INDIAN HEAD INC., *Defendants.*	75 Civ. 229 (CES)
SHAMROCK CORPORATION, individually, and on behalf of all holders of Common Stock and Warrants of Indian Head Inc., similarly situated, *Plaintiffs,* —*against*— INDIAN HEAD INC.; THYSSEN-BORNEMISZA GROUP N.V.; THYSSEN-BORNEMISZA, INC.; WHITE, WELD & Co. INCORPORATED; RICHARD J. POWERS; JAMES E. ROBISON, HERBERT E. BACHRACH; GERARD B. HUISKAMP; L. EMERY KATZENBACH; MARSHALL F. SMITH; H. H. THYSSEN-BORNEMISZA; R. L. GENILLARD; THYSSEN-BORNEMISZA HOLDINGS, INC. and CHEMICAL BANK, *Defendants.*	FILE: 75 Civ. 1736 (CES)

ORDER

Upon the Affidavit of William Klein II, sworn to on the 20th day of July, 1976, and upon the Stipulation and Agree-

ment of Settlement dated July 20, 1976 as amended by the Amendment to Stipulation and Agreement of Settlement dated July 28, 1976 ("Agreement"), annexed hereto, which has been executed by counsel for the parties in the above-captioned actions, and upon the consent of counsel for the parties in the above-captioned actions, and upon all of the prior proceedings herein;

Now, THEREFORE, it is hereby

ORDERED, that the above-captioned actions shall be maintained as class actions, for purposes of settlement only, on behalf of the following classes:

(i) *Common Stock Class.* All owners, beneficially or of record, of $1.00 par value common stock ("Common Stock") of Indian Head as of the date this Order is entered who continue to own such Common Stock on the date of the merger (the "Merger Date") to be effected as provided in the annexed Agreement;

(ii) *Debenture Owner Class.* All owners, beneficially or of record, of 5½% Convertible Subordinated Debentures due April 15, 1993 of Indian Head ("Debentures") as of the date this Order is entered who continue to own such Debentures on the Merger Date;

(iii) *Debenture Seller Classes.* Former owners, beneficially or of record, of Debentures, as follows:

Debenture Seller Class A. All such owners on September 27, 1973 who sold such Debentures between September 27, 1973 and July 1, 1974, inclusive;

Debenture Seller Class B. All such owners on July 2, 1974 who sold such Debentures between July 12, 1974 and the date this Order is entered, inclusive;

(iv) *Warrant Owner Classes.* Owners, beneficially or of record, of warrants issued pursuant to the Warrant Agreement dated as of May 15, 1965 between

Indian Head and Chemical Bank ("Warrants"), as follows:

Warrant Owner Class A. All such owners as of the date this Order is entered who continue to own such Warrants on the Merger Date;

Warrant Owner Class B. All members of Warrant Owner Class A who were owners of Warrants on July 2, 1974;

(v) *Warrant Seller Classes.* Former owners, beneficially or of record, of Warrants, as follows:

Warrant Seller Class A. All such owners on July 2, 1974 who sold such Warrants between July 12, 1974 and the date this Order is entered, inclusive;

Warrant Seller Class B. All such owners who sold such warrants between August 1, 1973 and July 1, 1974, inclusive; and it is further

ORDERED, that Edward Brucker and Daniel R. Kaplan are designated as representatives of all the foregoing classes; that William B. Weinberger is designated as representative of the Debenture Owner Class and Debenture Seller Classes; Cecil G. Huskey, W. T. Stratton and Shamrock Corporation are designated as representatives of the Warrant Owner Classes and Warrant Seller Classes; and that Norte & Co., a partnership composed of Joseph C. Galdi and Rita D. Galdi, is designated as representative of the Common Stock Class; and it is further

ORDERED, that Austrian, Lance & Stewart, P.C. is designated lead counsel for all classes designated herein, Weinstein & Levinson is designated co-counsel for the Debenture Owner Class and Debenture Seller Classes designated herein and Wolf, Haldenstein, Adler, Freeman, Herz & Frank as co-counsel for the Warrant Owner Classes and Warrant Seller Classes designated herein; and it is further

ORDERED, that a hearing shall be held on the 13th day of October, 1976, at 4:00 P.M. in Room 2703 in the United States Courthouse, Foley Square, New York, New York 10007, and continuing thereafter on such adjourned date or dates as the Court may direct, to determine whether the terms of the annexed Agreement, and the merger therein provided, are fair, reasonable and adequate, whether they should be approved by the Court and to schedule a subsequent hearing to be held without further notice to determine whether the fees and allowances as may be applied for by plaintiffs' counsel in the above-captioned actions should be approved; and it is further

ORDERED, that within ten (10) business days after entry of this Order, Thyssen-Bornemisza, Inc. ("TBI") shall mail or cause to be mailed, at its expense, by United States mail, postage prepaid, to each and every member of the classes designated above whose name and address appears on the records of Indian Head, at such address, a Notice of Settlement Hearing ("Notice") substantially in the form of Exhibit "B" to the annexed Agreement, and in the case of each and every member of the Debenture Seller Classes and the Warrant Seller Class A, TBI shall, in addition, mail or cause to be mailed to each Proofs of Claim substantially in the form of Exhibit "C" to the annexed Agreement, and that within five (5) days after such mailings TBI shall cause to be filed with the Clerk of the Court an affidavit showing that such mailings have been made as directed herein; and it is further

ORDERED, that TBI shall cause to be published at its expense the Notice susbtantially in the form of Exhibit "B" in The New York Times and The Wall Street Journal (Eastern, Midwest, Southwest and Pacific Coast editions) in columns no smaller than one-eighth of a page on one (1) business day in each of two (2) successive weeks commencing within ten (10) business days after the date of this Order, and further requiring that within five (5) days after

the last of such publications TBI shall cause to be filed with the Clerk of the Court an affidavit of such publication; and it is further

ORDERED, that all brokerage firms and other financial institutions which are or were or whose nominees are or were the record owners of Common Stock, Debentures or Warrants, shall transmit any Notices received to all persons who by their records are shown to be beneficial owners or former owners of Common Stock, Debentures or Warrants who are members of any class designated herein and any Proofs of Claim received to all such former beneficial owners who are members of the Debenture Seller Classes or Warrant Seller Class A designated herein, shall request such additional Notices and Proofs of Claim as are necessary to comply with this Order, and shall be reimbursed by TBI, upon written request, for the reasonable and necessary expenses of complying with this Order; and it is further

ORDERED, that the foregoing methods of notice are the best practicable under the circumstances and that the form of Notice in Exhibit "B" fully and fairly describes the terms of the settlement and merger provided for in the annexed Agreement; and it is further

ORDERED, that plaintiffs shall, with the cooperation of the Clerk of the Court, lease a numbered post office box of adequate size in the City of New York, in the name of the Clerk of the Court, for the purpose of receiving Proofs of Claim, requests for exclusion and any other communications from class members, and that all notices to class members shall bear the designation of said post office box as the return address; and it is further

ORDERED, that in order to assert a claim to the settlement funds provided for in the annexed Agreement, a member of the Debenture Seller Classes or the Warrant Seller Class A

must mail to the Clerk of the Court, at the post office box provided for herein, a Proof of Claim by November 24, 1976, and that failure to mail a Proof of Claim by such date shall terminate any rights which he may have to participate in the distribution of the settlement funds provided for in the annexed Agreement and to assert any claim against any of the defendants arising from or relating to the subject matter of any of the pleadings in the above-captioned actions, unless he has filed a written request for exclusion, as provided herein, from the class of which he would otherwise be a member; and it is further

ORDERED, that plaintiffs shall deliver to Shearman & Sterling, attorneys for certain defendants, (1) copies of communications received at the post office box provided for herein or by plaintiffs' counsel from members of the class within three (3) days of any request therefor, and (2) promptly, copies of replies to any inquiries or communications regarding the Notice; and it is further

ORDERED, that any person who desires to be excluded from any class shall mail to the Clerk of the Court, at the post office box provided for herein, a written request for exclusion, postmarked not later than fifteen (15) days prior to the hearing set herein, stating

(i) His or her name, address and telephone number;

(ii) The number of shares of Common Stock, principal amount of Debentures and number of Warrants he or she purchased and sold; and

(iii) The number of shares of Common Stock, principal amount of Debentures and number of Warrants he or she continues to own; and

that any person who so mails such a written request for exclusion shall not share in the benefits of the settlement and will not be bound by any judgment entered thereon and that failure to submit a written request for exclusion by the prescribed date will result in such class member's being bound by the terms of any judgment or order in the above-captioned actions, including a judgment approving the settlement and the merger as provided in the annexed Agreement; and it is further

ORDERED, that no person, other than a class member who does not request exclusion in the manner provided for above, may object to the approval of the settlement provided for in the annexed Agreement, and that any class member who objects to the approval of the settlement provided for in the annexed Agreement may appear at the hearing personally or through counsel of his or her choice and show cause, if any he or she has, why the settlement and merger proposed in the annexed Agreement should not be approved as fair, reasonable and adequate, and why a judgment should not be entered thereon, provided, however, that no such class member will be heard and no brief or other papers, if any, will be received or considered by the Court, except as the Court may in its discretion direct, unless a notice of intention to appear and a statement of the position to be asserted and the grounds therefor, together with satisfactory proof of class membership, and any briefs or other papers which such class member may choose to submit, are filed with the Clerk of the Court and served upon Austrian, Lance & Stewart, P.C., 630 Fifth Avenue, Rockefeller Center, New York, N.Y. 10020, and upon Shearman & Sterling, 53 Wall Street, New York, N.Y. 10005, not later than fifteen (15) days prior to the hearing set herein; and it is further

ORDERED, that no class member shall be entitled in any way to contest the approval of the settlement and merger provided for in the annexed Agreement unless he or she has served and filed the papers specified above, and that any class member who fails to object in the manner prescribed shall be deemed to have waived, and shall be foreclosed forever from raising, any objections; and it is further

ORDERED, that the institution, maintenance, or prosecution of any and all actions, suits, claims, arbitrations or any other proceedings by any person arising out of or relating to the subject matter of any of the pleadings in the above-captioned actions, the terms of the annexed Agreement or the merger provided for therein shall be stayed and enjoined in any court other than before the Honorable Charles E. Stewart, Jr. of the United States District Court for the Southern District of New York, pending entry of a judgment and order determining whether the settlement and merger as provided for in the annexed Agreement are fair, reasonable and adequate; and it is further

ORDERED, that the Court hereby retains jurisdiction to alter or amend this Order pursuant to Rule 23 of the Federal Rules of Civil Procedure.

Dated: New York, New York
Aug. 2, 1976

/s/ CHARLES E. STEWART JR.
U.S.D.J.
MG

Appendix II

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDWARD BRUCKER et al., Plaintiffs, —against— THYSSEN-BORNEMISZA EUROPE N. V. et al., Defendants.	74 Civ. 5755 (CES)
WILLIAM B. WEINBERGER, Plaintiff, —against— RICHARD J. POWERS et al., Defendants.	75 Civ. 229 (CES)
SHAMROCK CORPORATION et al., Plaintiffs, —against— INDIAN HEAD INC. et al., Defendants.	75 Civ. 1736 (CES)

NOTICE OF INDIAN HEAD INC. CLASS ACTIONS, PROPOSED SETTLEMENT AND HEARING

To: ALL PRESENT OWNERS OF INDIAN HEAD COMMON STOCK, CONVERTIBLE DEBENTURES AND WARRANTS

ALL OWNERS OF INDIAN HEAD DEBENTURES ON SEPTEMBER 27, 1973 WHO SOLD THEM THEREAFTER

ALL OWNERS OF INDIAN HEAD DEBENTURES ON JULY 2, 1974 WHO SOLD THEM THEREAFTER

ALL OWNERS OF INDIAN HEAD WARRANTS ON JULY 2, 1974 WHO CONTINUE TO OWN THEM

ALL OWNERS OF INDIAN HEAD WARRANTS ON JULY 2, 1974 WHO SOLD THEM THEREAFTER

ALL OWNERS OF INDIAN HEAD WARRANTS WHO SOLD THEM BETWEEN AUGUST 1, 1973 AND JULY 1, 1974.

A PROPOSED SETTLEMENT HAS BEEN REACHED IN THE ABOVE-CAPTIONED ACTIONS. THIS NOTICE SETS OUT THE PROCEDURE BY WHICH ALL PRESENT OWNERS OF INDIAN HEAD INC. COMMON STOCK, CONVERTIBLE DEBENTURES OR WARRANTS, AND CERTAIN FORMER OWNERS OF INDIAN HEAD CONVERTIBLE DEBENTURES OR WARRANTS, MAY SHARE IN THE SETTLEMENT PROCEEDS IF THE PROPOSED SETTLEMENT IS APPROVED BY THE COURT.

1. PLEASE TAKE NOTICE THAT, pursuant to Rule 23 of the Federal Rules of Civil Procedure and pursuant to an order of the United States District Court for the Southern District of New York, dated August 2, 1976:

A. *Settlement Hearing.* A hearing will be held in the above-captioned actions in Room 2703, United States Courthouse, Foley Square, New York, New York, at 4 P.M. on October 13, 1976 ("Settlement Hearing") on an application by the parties to these actions (i) to determine the fairness, reasonableness and adequacy of the proposed settlement and whether these actions should be dismissed on the merits and with prejudice as to all defendants, and (ii) if the proposed settlement be approved, to schedule a hearing to determine allowable fees, disbursements and expenses, as hereinafter more particularly described. The Settlement Hearing may be adjourned by the Court without further notice other than an announcement in court on the above date.

B. *Class Certification.* The above-captioned actions have been ordered to be maintained as class actions for purposes of this settlement on behalf of *all Owners, beneficially or of record, of the following Indian Head securities, during the periods specified:*

COMMON STOCK CLASS. *All Owners of Indian Head Common Stock on August 2, 1976 who have con-*

*tinuously owned such shares to and including the date of the proposed merger of Indian Head into Thyssen-Bornemisza Holdings, Inc. which will take place if the proposed settlement is approved (the "*MERGER DATE*").*

DEBENTURE OWNER CLASS. *All Owners of Indian Head 5½% Convertible Subordinated Debentures due April 15, 1993 ("Debentures") on August 2, 1976 who have continuously owned them to and including the* MERGER DATE.

DEBENTURE SELLER CLASS A. *All Owners of Debentures on September 27, 1973 who sold such Debentures between September 27, 1973 and July 1, 1974.*

DEBENTURE SELLER CLASS B. *All Owners of Debentures on July 2, 1974 who sold such Debentures between July 12, 1974 and August 2, 1976.*

WARRANT OWNER CLASS A. *All Owners of Indian Head Warrants issued pursuant to the Warrant Agreement dated as of May 15, 1965 between Indian Head and Chemical Bank ("Warrants") on August 2, 1976 who have continuously owned them to and including the* MERGER DATE.

WARRANT OWNER CLASS B. *All Owners of Warrants on July 2, 1974 who have held them continuously to and including the* MERGER DATE.

WARRANT SELLER CLASS A. *All Owners of Warrants on July 2, 1974 who sold such Warrants between July 12, 1974 and August 2, 1976.*

WARRANT SELLER CLASS B. *All Owners of warrants who sold such Warrants between August 1, 1973 and July 1, 1974.*

WHAT YOU WILL RECEIVE UNDER THE PROPOSED SETTLEMENT AND HOW TO OBTAIN IT.

Proposed Cash Settlement Payments.

2. Under the proposed settlement, class members who accept the settlement and who comply with the procedures summarized below will receive the following cash payments:

COMMON STOCK CLASS [585,547 shares publicly outstanding]—*$32 per share:*

To be paid upon the Merger and submission of your Stock Certificates together with a properly filled out Transmittal Letter which will be sent to owners of record upon the Merger.

DEBENTURE OWNER CLASS [14,293 Debentures (face value $1,000) outstanding]—*$844.16 for each Debenture:*

To be paid after the Merger and upon submission of your Debenture Certificates together with a properly filled out Transmittal Letter, which will be sent to owners of record upon the Merger, together with any required documentation.

DEBENTURE SELLER CLASS A—If you can establish that you sold any Debentures for *less than $650:*

You will be entitled to be paid the difference between $650 and your sales price (before deducting expenses of sale), *but no more than $50 per Debenture,* provided that you fill out a green Proof of Claim; attach to the Proof of Claim brokerage confirmations, monthly statements or other written proof of ownership and sales price and mail or file it as provided in Paragraph 17 below. Any objection by defendants to your Proof of Claim will be submitted to the Court for final determination. After the Merger, you will receive payment up to $50 per Debenture, provided the Court has not sustained any objection which may have been made to your Proof of Claim.

DEBENTURE SELLER CLASS B—If you can establish that you sold any Debentures for *less than $701.*

You will be entitled to be paid the difference between $701 and your sales price (before deducting expenses of sale), *but no more than $100 per Debenture,* provided that you fill out a yellow Proof of claim, attach to the Proof of Claim brokerage confirmations, monthly statements or other written proof of ownership and sales price and mail or file it as provided in Paragraph 17 below. Any objection by defendants to your Proof of Claim will be submitted to the Court for final determination. After the Merger, you will receive the payment of up to $100 per Debenture, provided the Court has not sustained any objection which may have been made to your Proof of Claim.

WARRANT OWNER CLASS A [349,467 Warrants publicly outstanding]—*$3.50 per Warrant:*

To be paid after the Merger and upon submission of your Warrant Certificates together with a properly filled out Transmittal Letter, which will be sent to owners of record upon the Merger, together with any required documentation.

WARRANT OWNER CLASS B— *$4 per Warrant:*

To be paid after the Merger and upon submission of your Warrant Certificates together with a properly filled out Transmittal Letter which will be sent to owners of record upon the Merger, and written proof of the dates of purchase, together with any required documentation.

WARRANT SELLER CLASS A—*$1.50 per Warrant:*

To be paid after the Merger, provided that you fill out a blue Proof of Claim, attach to the Proof of Claim brokerage confirmations, monthly statements

or other written proof of ownership and sale and mail or file it as provided in Paragraph 17 below. Any objection by defendants to your Proof of Claim will be submitted to the Court for final determination. After the Merger, you will receive the payment of $1.50 per Warrant, provided the Court has not sustained any objections which may have been made to your Proof of Claim.

WARRANT SELLER CLASS B:

The Settlement makes no provision for payment to members of this Class because plaintiffs' counsel are of the opinion that members of this Class can neither establish liability of the defendants, nor damages. The affidavit of plaintiffs' counsel dated July 20, 1976, on file in the Court and available for inspection, gives a more detailed explanation. Members of this Class will be bound by the proposed settlement, and thus receive no payment thereunder, unless they elect to be excluded as hereinafter provided.

Effect of Accepting Settlement.

3. By submitting a Proof of Claim or Transmittal Letter as described above, you will submit your claims to the jurisdiction of the Court and release the defendants from all claims which were or could have been asserted in these actions. If you are a class member and neither exclude yourself from the settlement in the manner prescribed below nor file a timely and proper Proof of Claim or Transmittal Letter as provided herein, you will be forever barred from recovery from the defendants with respect to all claims which are or could have been asserted in these actions.

Proposed Merger.

4. Upon entry of a Judgment and Order of the Court approving this settlement upon the terms and conditions of

the Settlement Agreement, THYSSEN-BORNEMISZA, INC. ("TBI") shall cause INDIAN HEAD to be merged into THYSSEN-BORNEMISZA HOLDINGS, INC., a subsidiary which will be formed by TBI, pursuant to §253 of the Delaware Corporation Law (the "MERGER"), paying thereafter $32 for each share of Common Stock of INDIAN HEAD issued and outstanding on the MERGER DATE to holders of Common Stock.

Escrow Payments.

5. After the MERGER DATE, TBI will pay $12,100,000 into a Debenture Settlement Fund to be administered by MARINE MIDLAND BANK and pay $1,450,000 into a Warrant Settlement Fund to be administered by CHEMICAL BANK, and will make such additional payments to such Funds as are necessary to effectuate the terms of the proposed settlement. The Debenture and Warrant class members will be paid by MARINE MIDLAND BANK and CHEMICAL BANK, respectively, the sums to which they are entitled from such Settlement Funds as promptly as practicable after the approval of the settlement and receipt of Proofs of Claim and Transmittal Letters.

Settlement Agreement and Court Papers.

6. The full and complete terms of the proposed settlement are contained in a Stipulation and Agreement of Settlement, as amended ("Settlement Agreement"). The Settlement Agreement, together with the pleadings and all other papers, including the Order of the Court certifying these actions as Class Actions and directing the Settlement Hearing herein described, are on file with the Clerk of the United States District Court for the Southern District of New York, Foley Square, New York, New York, and are available for inspection at any time from 9:30 A.M. to 5:00 P.M., Monday through Friday, holidays excepted, at the Office of the Clerk. Any questions you may have with

respect to this Notice and the Settlement Agreement should be raised with your attorney or advisor, or directed to lead counsel for plaintiffs, WILLIAM KLEIN II, ESQ., AUSTRIAN, LANCE & STEWART, P.C., 630 Fifth Avenue, New York, New York 10020 (Tel. No. [212] 489-9500), and not with the Court. In order to determine the tax consequences, if any, of the money received pursuant to the settlement, you should consider consulting your own accountant or attorney.

Attorney Fees:

7. If the proposed settlement is approved by the Court, applications will be made by AUSTRIAN, LANCE & STEWART, P.C., lead counsel, WEINSTEIN & LEVINSON, co-counsel for the Debenture Owner Class and Debenture Seller Classes, and WOLF, HALDENSTEIN, ADLER, FREEMAN, HERZ & FRANK, co-counsel for the Warrant Owner and Warrant Seller Classes, for their fees and expenses. TBI has agreed to pay the reasonable fees and expenses of counsel for plaintiffs in the above-captioned actions in such amounts as are awarded by the Court, but not more than an aggregate amount of $600,000.

The Settlement Hearing.

8. If you are satisfied with the proposed settlement, you need not appear at the Settlement Hearing, and your interests will be represented by plaintiffs' counsel. Any person who establishes membership in any class described herein may appear at the Settlement Hearing and show cause, if such member has any, why the proposed settlement should not be approved and the action dismissed. No person shall be heard at the Settlement Hearing unless notice of intention to appear and grounds for objection in writing, together with any supporting papers and briefs which such class member may choose to submit, are filed with the Court on

or before September 28, 1976, showing due proof of service on both of the following:

Austrian, Lance & Stewart, P.C.
630 Fifth Avenue
New York, New York 10020

Lead Counsel for All Classes

Shearman & Sterling
53 Wall Street
New York, New York 10005
Attorneys for Certain Defendants

Any class member who does not make objection in the manner provided herein shall be deemed to have waived such objection and shall be forever foreclosed from making any objection (by appeal or otherwise) to the proposed settlement. The filing of an objection shall not extend the time within which a class member may file an acceptable Proof of Claim or request exclusion from a class nor exclude the objector from any judgment entered in these actions.

DESCRIPTION OF THE LITIGATION

Original Brucker Complaint.

9. On December 31, 1974 the Brucker plaintiffs on behalf of themselves and other owners of Indian Head Convertible Debentures commenced an action against a number of defendants, including INDIAN HEAD, THYSSEN-BORNEMISZA EUROPE N.V. ("TBE"), TBI and certain officers and directors of those companies. This original Brucker Complaint alleged that no notice was sent to the Debenture owners of the Tender Offers made by TBE on September 27, 1973 and July 12, 1974, as a result of which TBI acquired 90.6% of Indian Head Common Stock; the Debentures and Common Stock were delisted from the New York Stock Exchange; the Debenture owners were thereby deprived of the opportunity to convert into Common Stock and receive

$701 for each $1,000 Debenture; and after TBE acquired control and the Debentures and Common Stock were delisted, the market price for the Debentures had fallen below $500. (The above-entitled *Weinberger* action, commenced in January 1975, made similar complaints on behalf of Debenture owners, and the above-entitled *Shamrock* action, commenced in April, 1975 on behalf of Indian Head Warrant owners, alleged that the terms of the Tender Offers were unfair.)

Brucker Amended Complaint.

10. On February 20, 1976 the Brucker plaintiffs filed an Amended Complaint on behalf of all Indian Head Common Stock and Warrant owners, as well as Debenture owners, alleging that TBE had proposed on February 12, 1976 to merge Indian Head into a TBE subsidiary, on unfair and unlawful terms: $779 for the Debentures, which were then redeemable at $1,033; $30 for the Common Stock; and the Warrants, which were exercisable at the same $30 price as was being offered the Common stock, would receive nothing. It further alleged that the merger was a redemption of the Debentures at $1,033; the failure to notify the Debenture owners of the tenders created a default causing the $1,000 principal to be due and payable; the Merger had no business purpose; and TBE had used its majority control of Indian Head to dictate unfair prices to the members of all classes. (An Amended Complaint filed in the *Shamrock* action on March 4, 1976, made similar allegations on behalf of Warrant holders and Common Stock holders.) A preliminary injunction was requested to stop the merger, and on the return date of the preliminary injunction hearing the proposed merger was withdrawn ("Withdrawn Merger Proposal").

Second Amended Complaint.

11. On July 20, 1976, the Brucker plaintiffs filed, in connection with the proposed settlement, a Second Amend-

ed Complaint which embodied the facts, circumstances and allegations contained in the various proceedings since the litigation commenced. The plaintiffs include two Warrant holders owning an aggregate of 9,100 Warrants, and an owner of 32 shares of Common Stock. In addition to the allegations in the prior complaints, it was alleged that both tender offers were made in violation of the rights of Warrant owners.

Defendants' Denial of Liability.

12. The defendants, while denying all liability on the charges made in the actions, maintaining their innocence of any wrongdoing, and relying upon the stipulation that the settlement shall not in any event be construed as or deemed to be evidence or an admission or concession on the part of the settling defendants or any of them, of any liability or wrongdoing whatsoever, consider it desirable that the actions be settled. Such settlement is desired to avoid further expense, to preserve and protect their business reputations, to dispose of burdensome and protracted litigation and to permit the merger of Indian Head into a subsidiary of TBI to proceed unhampered by expensive litigation and the distraction and diversion of its executive personnel; and they have accordingly agreed to the settlement on the terms stated in the Settlement Agreement.

Plaintiffs' Counsel's Recommendation of Settlement.

13. Plaintiffs, by their attorneys and experts, have made a thorough and detailed investigation of the facts, circumstances and transactions involved in this action, and have conducted an extensive investigation of the ten year-documentary record underlying the transactions involved in the above-captioned actions and of the financial, market and economic aspects thereof. After taking into account the likelihood that this litigation, if not settled now, will be protracted and extensive, involving uncertain questions of establishing liability and difficulties in es-

tablishing damages, the risks inherent in litigation and potential time-consuming appeals, counsel for the plaintiffs have concluded that it would be in the best interests of plaintiffs and the classes to settle the actions on the terms of the proposed settlement.

In counsel's opinion (and taking into account that the Debentures and Warrants expire in 1993 and 1990, respectively), the class members will receive as much on settlement, and possibly more, than they might be awarded in damages, after trial, assuming they could obtain a judgment on liability, which plaintiffs' counsel deems questionable. Thus, the Warrant owner on July 2, 1974 who continues as an owner on the Merger Date receives $4 compared to nothing in the Withdrawn Merger Proposal and approximately $4.50 in the market prior to the July 12, 1974 tender offer. $844.16 for the Debentures compares to the $1,000 face amount, the $701 requested in the original Brucker Complaint and $420—$480 in the market after the Debentures were delisted from the New York Stock Exchange in September 1974. $32 for the Common Stock is $5 more than the tender offers and $10 more than the market price before the 1974 tender offer. The market prices on February 11, 1976, the day before the Withdrawn Merger Proposal was announced, were: Warrants: $2; Common Stock: $24; and for a $1,000 Debenture, $600.

Purpose of Notice.

14. This Notice is being sent to you in the belief that you are an owner of Common Stock of Indian Head or that you are or were an owner of Debentures or Warrants and that your rights may be affected by these actions and the proceedings described in this Notice. This Notice is not an expression of any opinion by the Court as to the merits of any claim or defense in these actions, but is solely to inform you of the pendency of the actions and of the proposed settlement described herein, so that you may decide what steps you may wish to take in relation to these actions and the

proposed settlement. Former Owners of Indian Head Common Stock who tendered their shares in either of the two Tender Offers described above are not affected by nor a part of the proposed settlement and, therefore, are not being sent notice thereof.

SPECIAL NOTICE TO BROKERAGE FIRMS AND OTHER FINANCIAL INSTITUTIONS

15. All brokerage firms and other financial institutions which are or were or whose nominees are or were the record owners of Common Stock, Debentures or Warrants are directed, by Order of the Court, to transmit any Notices received to all persons who by their records are shown to be beneficial owners or former owners of Common Stock, Debentures or Warrants who are members of any class designated herein and any Proofs of Claim received to all such former beneficial owners who are members of the Debenture Seller Classes or Warrant Seller Class A, are further directed to request from the Clerk of the United States District Court for the Southern District of New York, P.O. Box 1046, New York, New York 10005, such additional Notices and Proofs of Claim as are necessary to comply with the Court's Order, and shall be reimbursed by TBI, upon written request, for the reasonable and necessary expenses of complying with the Court's Order described in this paragraph.

Settlement Conditions.

16. This proposed settlement is subject to and will not become effective until final approval by the District Court. TBI has the option to terminate the Settlement Agreement, if:

(a) Requests for exclusion from the settlement (see below) are returned by persons who, had they been members of the Common Stock Class and had not elected to be excluded therefrom, would have been en-

titled by reason of their Common Stock Class membership to more than $500,000 in aggregate amount under the terms of the Settlement Agreement or the Merger; or

(b) A judgment and order of the Court approving this proposed settlement upon the terms and conditions of the Settlement Agreement, including the Merger, is not entered within thirty (30) days following the conclusion of the Settlement Hearing; or

(c) The Merger is stayed or enjoined or cannot be effected for any reason.

PROOF OF CLAIM BY SELLERS OF DEBENTURES OR WARRANTS

Filing of Claims.

17. Proofs of Claim are available upon request by writing to the Clerk of the United States District Court, Southern District of New York, P.O. Box 1046, New York, N. Y. 10005. Members of Debenture Seller Class A should request a green Proof of Claim, members of Debenture Seller Class B should request a yellow Proof of Claim and members of Warrant Seller Class A should request a blue Proof of Claim. Each such Proof of Claim must be mailed either to the address designated therein or filed with the Court no later than November 24, 1976, accompanied by written evidence of your purchases and sales. Any class member who fails to mail a valid and timely request for exclusion and who fails to submit a Proof of Claim by such date shall be precluded from sharing in the distribution of the Settlement Funds, but will in all other respects be subject to the provisions of the Settlement Agreement and any judgment or orders entered pursuant thereto. A Proof of Claim shall be deemed submitted when posted if it has been properly filled out and signed, a postmark is indicated on the envelope, and it is mailed postage prepaid, addressed in accordance with the instructions given therein. (To be sure of a proper post-

mark, you should take the envelope to a Post Office window for hand stamping with a date).

Review of Claims.

18. Proofs of Claim and Transmittal Letters submitted by members of the various Debenture classes will be reviewed by Marine Midland Bank, and those submitted by members of the various Warrant classes will be reviewed by Chemical Bank. Any questions concerning the payment or nonpayment of any Proofs of Claim or Transmittal Letters will be referred to Austrian, Lance & Stewart, P.C., lead counsel for the classes, and Shearman & Sterling, counsel for certain defendants. Any questions unresolved by such counsel will be submitted to the Court for final determination. Payment to any class member who participates in an appeal of a judgment approving the proposed settlement will be withheld until the determination of such appeal.

Payment of Expenses.

19. TBI shall pay all costs and expenses incurred in connection with the administration and distribution of the respective Settlement Funds and processing Proofs of Claim and Transmittal Letters and all costs and expenses incurred in the mailing and publication of this Notice, Proofs of Claim and Transmittal Letters.

CONSIDERATIONS AFFECTING RIGHTS OF SECURITY HOLDERS

Common Stock Owners.

20. After the Merger Date each holder of Common Stock, whether or not a member of the Common Stock Class, will be entitled pursuant to the Merger to a cash payment of $32 per share in cancellation of each share of such Common Stock. Each owner of record of Common Stock on the Merger Date will have appraisal rights under

the laws of the State of Delaware, so that such owner who elects not to accept $32 per share pursuant to the Merger may seek appraisal of the value of the Common Stock owned.

Debenture Owners.

21. A member of the Debenture Owner Class *is not required to submit* the Debenture(s) and accept the $844.16 payment for each Debenture owned. Such member is entitled to hold the Debenture(s) and receive periodic interest payments when due and principal payments at maturity. However, upon consummation of the Merger contemplated by the Settlement Agreement, an owner of Debentures will no longer have the right to convert such Debentures into Common Stock, but will be entitled only to receive a cash payment of $831.17 upon surrender for conversion of each Debenture. Interest in the amount of $27.50 per $1,000 principal amount of Debentures is payable on October 15, 1976 to holders of record on September 30, 1976. Any owner of Debentures who desires to convert such Debentures into Common Stock prior to the Merger in order to exercise the right of appraisal under Delaware law should discuss the advisability of such action with the owner's legal and financial advisors. A conversion of the Debentures into Common Stock will result in the exclusion of the Debenture Owner from the Debenture Owner Class, thereby rendering the owner ineligible to receive the benefits of the Settlement Agreement.

Warrant Owners.

22. A member of Warrant Owner Classes A or B *is not required to submit* the Warrants and accept the $2.50 or $4 payments provided by the Settlement Agreement. However, upon consummation of the Merger contemplated by the Settlement Agreement, an owner of Warrants will no longer have the right to exercise the Warrants for the purchase of Common Stock, but will be entitled only to receive a cash

payment of $32 upon surrender of each Warrant and the payment to Indian Head of the then exercise price (currently $30 per Warrant). In addition, any owner of Warrants who desires to exercise the Warrants to purchase Common Stock prior to the Merger in order to exercise a right of appraisal under Delaware law should discuss the advisability of such action with the owner's legal and financial advisors. Such exercise of the right to purchase Common Stock will result in the exclusion of the Warrant Owner from any Warrant Owner Class, thereby rendering the owner ineligible to receive the benefits of the Settlement Agreement.

ELECTION TO BE EXCLUDED FROM CLASS ACTION

Written Request.

23. Any class member may elect to be excluded from a class by mailing to the Clerk, United States District Court, Southern District of New York, P.O. Box 1046, New York, N. Y. 10005, written request for exclusion on or before September 28, 1976. Any class member requesting exclusion from the proposed settlement must state in writing:

(a) The member's name, address and telephone number;

(b) The number of shares of Common Stock, principal amount of Debentures and number of Warrants the member purchased and sold; and

(c) The number of shares of Common Stock, principal amount of Debentures and number of Warrants the member continues to own.

Consequences of Exclusion.

24. A class member making a request for exclusion will not share in the benefits of the settlement, will not be bound by any judgment entered in the above-captioned actions,

and will only be able to pursue the member's individual claim, if any. Failure to submit a request for exclusion by September 28, 1976 will result in a class member being bound by the terms of any judgment or order in the above-captioned actions, including a judgment and order approving the proposed settlement.

Dated: New York, New York
August 2, 1976

By Order of the Court:

Clerk of the United States District Court
For the Southern District of New York

Supreme Court, U. S.
FILED
SEP 19 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-185

MORTON P. ROME and MARJORIE T. ROME, Trustees under a Trust Agreement,

Petitioners,

v.

INDIAN HEAD INC. *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PLAINTIFFS-RESPONDENTS IN OPPOSITION

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IN THE

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MORTON P. ROME and MARJORIE T. ROME,
Trustees under a Trust Agreement,
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v.

INDIAN HEAD INC. *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PLAINTIFFS-RESPONDENTS IN OPPOSITION

Respondents, plaintiffs below in three class actions[1] brought by owners of Convertible Debentures, Common Stock and Warrants of Indian Head Inc., to prevent a so-called freeze out going private merger, respectfully pray that this Court deny petitioners'[2] writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit, which unanimously affirmed from the bench, without opinion, the District Court's judgment approving the

[1] *Edw. Brucker, et al.* v. *Thyssen-Bornemisza Europe N.V., et al.; William B. Weinberger* v. *Richard J. Powers, et al.; Shamrock Corporation, et al.* v. *Indian Head, Inc. et al.*

[2] Who own 25 out of 14,291 convertible debentures and no common stock or warrants.

$32 million settlement of this litigation and rejecting petitioners' common law claim to an absolute contract right to convert their Debentures into Common Stock. The settlement has been consummated and most of the members of each class—Debenture, Common Stock and Warrants—have claimed and received their distributions.

There Are No Questions for Review

The essence of the petition is in its last paragraph (p. 30) where petitioners ask that the entire settlement be vacated, and that this Court remand the case to the District Court:

> "with such appropriate directions as will prohibit alteration or impairment of the conversion rights into common stock of all Debentures owned by petitioners and other owners thereof without the affirmative consent of each Debenture owner affected."

Such relief, which would require this Court to review the contract—raises at most a common law, not a federal question. Moreover, it is the antithesis of the position petitioners maintained before the District Court, when they said:

> "I would also wish to make clear, not only to the Court, but to all counsel present that as counsel for the objecting parties here, we are not seeking to intrude into the Court's affirmation of the settlement if that is the conclusion that your Honor reaches insofar as the common stock is concerned or the warrants are concerned, nor indeed do we seek to prevent those holders of convertible debentures who assent to that which is being proposed here from indeed assenting." (App. 244a)[3]

[3] References are to the Appendix below.

Petitioners cannot convert their about face into a question for review by this Court.

Counter-Statement of the Case

The petition has its roots in the $32 million all cash settlement of three class action cases which posed the first Rule 10b-5 freeze out going private merger claim in the Southern District of New York after the Second Circuit Court of Appeals decision in *Green* v. *Santa Fe Industries, Inc.,* 533 F.2d 1283 (2d Cir. 1976), *rev'd,*——U.S.——, 51 L. Ed. 2d 480 (1977).

In capsule form, the story of this litigation falls into four parts:

1. The Take-Over.

Indian Head Inc., a diversified $300,000,000 American conglomerate with Common Stock and Convertible Debentures listed on the New York Stock Exchange and Warrants to Purchase Common Stock (then exercisable at $25) listed on the American Stock Exchange, was the target in 1973 and 1974, of two successful $27 per share Common Stock tender offers by Thyssen-Bornemisza Europe, N.V. (TBE) (App. 358a) which acquired a total of 90.6% of the Common Stock (App. 358a). Both the Common Stock and Debentures were then promptly delisted from the New York Stock Exchange, the market price for each fell sharply, and thereafter they were traded on the over-the-counter market at depressed prices (App. 104a), as were the Warrants on the American Stock Exchange. (App. 104a)

2. The Class Action Litigation.

After TBE acquired control of Indian Head three class action suits followed in quick succession:

First, on December 31, 1974, came plaintiffs-respondents Brucker and Kaplan ("Brucker"), record owners (as

trustees) of 11 Debentures, on behalf of all Debenture owners (App. 7a), followed three weeks later by plaintiff-respondent Weinberger, a former Debenture owner, likewise for all Debenture owners (App. 359a), and then in April, 1975 by plaintiff-appellee Warrant owner Shamrock Corporation ("Shamrock") on behalf of all Warrant owners (App. 359a).

All three actions alleged that the tender offers resulted in the delisting of the Debentures and Common Stock, destroying the market values of those securities, and of the Warrants which were exercisable into Common Stock. In the *Brucker* and *Weinberger* actions, the Debenture owners (whose Debentures were registered) complained that no notice of the tender offers was sent to them, thereby depriving them of the right to receive $701, if they converted, compared to the $650 market price for their Debentures during the 1974 tender offer. (App. 104a).

3. The Proposed Merger.

On February 12, 1976—eighteen months after the takeover—TBE announced (App. 359a) it proposed a short form Delaware all cash merger of Indian Head into a TBE subsidiary, offering $30 a share for the Common Stock ($3 more than the tender offers); $779 for each Debenture (which was $78 more than if it had been converted during the tenders); and *Nothing* for the Warrants, which in 1976 entitled the owners to purchase common stock for $30 a share (App. 359a).

Eight days after the proposed merger was announced, plaintiff-respondent Brucker filed an amended complaint and a motion for a preliminary injunction on behalf of the owners of Warrants and Common Stock, as well as Debentures, to enjoin the merger on the grounds that it had no business purpose; that the Indian Head minority investors

were all being frozen out at unfair prices; and that the merger was also a ruse to avoid redeeming the Debentures for $1,033 (App. 39a). Plaintiff-respondent Shamrock then amended its complaint, on behalf of Common Stock as well as Warrant owners and demanded rescission of the tender offers. (App. 92a).

On the return date of Brucker's motion to enjoin the proposed merger, TBE withdrew it and agreed to negotiate a settlement with all classes. (App. 360a).

4. The Settlement.

A. On July 28, 1976, a settlement of all three class actions was ultimately concluded (App. 360a). It provided for the cash merger of Indian Head into a TBE affiliate and for cash payments which were 40% more for the Common Stock than TBE's merger proposal, nearly double for the Debentures and infinitely more for the Warrants, namely: $32 per share for the Common Stock; $851.65 for each Debenture (with accrued interest), and $4 (or $2.50 depending on date of ownership) for the Warrants. In addition, the Debenture owners had the option to retain them with the right to convert at any time thereafter into $831 cash (a conversion ratio equivalent to $32 per share for the Common Stock). (App. 361a).

B. Debenture, Warrant and Common Stock classes were certified by the District Court, with Brucker representative of all classes, and his counsel lead counsel for all; Weinberger as representative of the Debenture classes and his counsel co-counsel for them; and Shamrock representative of the Warrant classes and its counsel co-counsel for them. (App. 151a).

C. After 60 days' prior mail notice, and national publication, two days of hearings on the fairness of the settle-

ment were held by the District Court (App. 353a). Petitioners filed a 51-page Brief, and appeared at both hearings contending that the Debenture Indenture gave them the absolute right to convert into Common Stock (of Indian Head's successor). They insisted that the class settlement could not deprive them of that "right" without their written consent. (App. 193a).

D. The Court below approved the settlement, analyzed petitioners' objections in detail, rejected them and denied them a stay (App. 352a, 426a). The merger was consummated on November 30, 1976, and the more than $32,000,000 in settlement payments to all three classes commenced thereafter, most of which has been claimed by and paid to them.

REASONS WHY THE WRIT SHOULD BE DENIED

I. Introductory.

Petitioners own no Common Stock and no Warrants, just 25 out of 14,291 Debentures. Their only claim is that under the Debenture Indenture, Indian Head could not merge for cash without petitioners' written consent. They then take that unalloyed common law contract claim, wrap it in the Constitution and ask that the entire settlement be vacated.

This is the third court in which petitioners have tried to camouflage their common law contract claim with a forest of federal "questions". But the forest is a mirage, here as below. There are no Rule 23 questions because they could only arise

> *if*
>
> petitioners have "several contract rights pursuant to the terms of their debentures which provided that

> there would be no alteration or impairment of their rights to convert into common stock without their consent." (Petition, p. 4).

The District Court found no such contract rights.

The Court of Appeals found none.

There are none.

And any question as to the existence of contract rights arises wholly under the Indian Head Indenture, and not under the U.S. Constitution or the Federal Rules of Civil Procedure.

Without contract rights, petitioners' attempt to discredit the adequacy of the class representation is as gratuitous as it is specious. They concoct a custom made class all for themselves: debenture owners who claim the right to consent in writing to any merger for cash, although there are none other than petitioners. Then they attack Brucker and Weinberger as inadequate representatives for choosing to settle, rather than fight.

But it is petitioners, not the representatives, who are inadequate for creating a claim so shallow that it staggers credulity.

II. The District Court Properly Exercised its Discretion in Approving the Settlement.

The District Court's review of petitioners' objections was so painstaking and well reasoned that it was swiftly affirmed by the Court of Appeals and warrants similar short shrift by this Court, as the following excerpts demonstrate:

1. The District Court correctly found petitioners do not have a right to convert into common stock.

"Many of the Romes' objections arise out of an assertion that the Indenture prevents any class action settlement involving debenture owners, as the Court can in no way alter ". . . the creditors [debenture holders] . . . separate and several contract rights . . ." without the individual written consent of each holder. They claim that the settlement can only bind those holders who affirmatively opt in and cannot bind those who do not respond. They also claim that the Indenture agreement prevents a forced conversion into money in the event of a merger, and requires either that Indian Head redeem the debentures or that Indian Head respect the absolute right to convert into common stock. (Pet. App. A 15).

* * *

"First, we agree that § 5.06 should control here because it contains a detailed and specific provision as to what the debenture holders' rights are in a merger while § 12.02 deals with their rights in a general context.

"In the case of a merger, § 5.06 requires that the supplemental Indenture contain the right to convert into whatever form of property the shareholders receive in the merger. Thus the debenture holders have never had an absolute right to convert into Indian Head stock in a merger, but only the right to convert into whatever form of "property" the shareholders would receive. Defendants argue that cash is "property" within the meaning of § 5.06. We agree that cash is within the scope of the term "property" as used in § 5.06, and note that it has been so interpreted in *Broenen v. Beaunit,* 440 F. 2d 1244 (7th Cir. 1970). Here, as a result of the proposed merger, the Indian Head shareholders will receive only cash for their

stock. Thus the provision in the settlement agreement allowing for conversion of the debentures into cash only is proper under § 5.06 because this is all the shareholders are receiving. In addition, § 5.06 does not require the individual written consent of each debenture holder when conversion rights are altered pursuant to a merger, so we conclude that the settlement abridges no rights of the debenture holders and can properly bind all debenture holders who do not opt out." (Pet. App. A 16-17).

2. The District Court correctly found that the three actions below were properly maintainable as class actions.

"First they object to the designation of the suits as class actions for purposes of settlement only, on the grounds that this is unauthorized by Rule 23 and is violative of the provisions of the Manual for Complex Litigation. . . . The Second Circuit has stated in *Grinnell, supra,* that the Manual recommendations 'were not meant to be intractable rules,' and that the major concern of the Manual may be satisfied where, as here, the settlement provides 'for notice of a hearing and an opportunity to challenge the fairness or any other aspect of the proposed settlement,' *Grinnell,* 495 F. 2d at 466. In addition, *Grinnell* stated that the Manual's objectives may be satisfied where, as here, the settlement was not negotiated in the early stages of the dispute, but rather after the parties had engaged in considerable litigation and were able to assess the risks of success, and where, as here, there were not different counsel vying to be class representatives before the settlement agreement was reached and publicized. . . . Therefore, the designation of these actions as class actions for purposes of settlement only was proper in this case.

"The objectors also claim that there is an abuse of the use of Rule 23. . . . The abuse to which the objectors point is the proposed settlement, which they contend will abridge the substantive conversion rights of the debenture holders. We do not agree that the settlement abridges any substantive rights of the debenture holders. . . . Further, we find that the Rule 23 procedures were properly followed. Full notice was given to all members of the classes, and their rights to appear and object, or to opt out, were fully explained. Thus the Rule 23 procedures have protected the substantive rights of the individual debenture holders. (Pet. App. A13-14).

"Since we find that no substantive rights of the debenture holders are abridged by this settlement, this dispenses with the following objectors' claims: 1) that representation of the class was not adequate. . . . 2) that their constitutional rights under the Fifth and Fourteenth Amendments and Article One, Section 10 were violated . . . . 3) that the class is not sufficiently numerous, since not a sufficient number assented in writing. . . ." (Pet. App. A17).

3. The District Court correctly found the settlement fair.

"In the instant case, there are complicated questions of law on both the issues of liability and damages. . . . One of the primary unresolved legal questions involves the interpretation and application of *Marshel, supra, Green, supra,*[4] *and Merit* v. *Libby, McNeill and Libby,* 533 F. 2d 1310 (2d Cir. 1976) to the attempted short-form merger in this case, particularly in light of the fact that the Indian Head merger is distinguishable on its facts from each of

[4] *Green,* which was heavily relied on by plaintiffs-respondents seeking to stay the merger and by petitioners in objecting to the settlement, was reversed by this Court, —— U.S. ——, 51 L. Ed. 2d 480 (1977).

the above cases. Thus the Court does not agree with the objectors' assertion that a liability is clear with respect to issues arising from the short-form merger. This case also presents complex legal and factual questions on a variety of other issues, among them: whether or not the 1973 and 1974 tender offers were false and misleading in failing to disclose that TBE would merge Indian Head into an affiliate; whether or not under *Van Gemert* v. *Boeing,* 520 F. 2d 1373 (2d Cir.), *cert. den.,* 423 U.S. 947 (1975), Indian Head was obligated to send notice of the tender offers to the registered debentures owners. (Pet. App. A12).

". . . The Court also has noted the favorable reaction of the classes to the settlement. In light of these factors, we find the settlement fair and reasonable." (Pet. App. A13).

III. Petitioners' Contract Claim is at Common Law and There is Neither a Federal Question Nor a Conflict Between the Circuits.

The District Judge found—and the Court of Appeals unanimously affirmed—that the Indian Head Indenture permitted a merger for cash without the Debenture owners' consent. Those findings involved common law questions of contract interpretation, in the context of this settlement, and nothing else. To the same effect, the 7th Circuit in *Broenen* v. *Beaunit Corporation,* 440 F.2d 1244, 1249 (1970) affirmed the dismissal of a complaint brought by a convertible debenture owner to enforce such an alleged right under an Indenture virtually identical to Indian Head's.[5]

[5] And only this past August 17, 1977, U.S. District Judge Robert Hill reached the same conclusion in an unreported Judgment and Conclusions of Law, *Broad* v. *Rockwell International Corp.,* CA3-74-437D (N. D. Texas, Dallas Div.).

Petitioners offer not a word, nor a case, to support their claim. Yet the illusion of such a common law contract right permeates each of the "questions" they invent in order to create their petition. The first two "questions" (Petition, p. 3, 4) assume, without explanation, that petitioners are not members of the Debenture class because their alleged common law contract right made them "non-parties". They then define "non-parties" in their third "question", as follows:

> "where such non-party convertible debenture owners had several contract rights pursuant to the terms of their debentures which provided that there would be no alteration or impairment of their rights to convert into common stock without their consent." (Petition, p. 4).

Thus petitioners apparently contend that in a cash merger settlement, a Convertible Debenture owner who claims a common law contract right to convert into Common Stock, is not a member of the Debenture class. They cite no authority for that proposition, much less any conflict between the Circuits, nor any decision of this Court. There are none.

Absent authority, bereft of a Federal issue, petitioners claim calamity. They argue that the decisions below are:

> "a serious threat to the entire national market for convertible debentures, because it opens the door to a method by which a practical destruction of the entire underlying basis for convertible debenture purchases may be effected." (Petition, p. 3).

But there is no evidence—not here, not in the District Court, not before the Court of Appeals—to support such an absurd conclusion. On the contrary, this Court can

take judicial notice that the American free enterprise system, and its free securities markets, would be seriously threatened if every convertible debenture owner had a veto over mergers for cash, even though his indenture permits it.

To petitioners complaint, there is an answer: object or opt-out. They made their choice and are bound by it.

IV. The Judgment Below Cannot be Set Aside as to Classes Which Petitioners Concede They Do Not Represent.

Petitioners do not claim to speak for the Warrant or Common Stock classes, or even for the overwhelming majority of the Debenture class which accepted the settlement. Thus it would be grossly inequitable for this Court even to consider taking a case where the petitioner has so marginal an interest.

This Court has held unequivocally that in class actions "a litigant must be a member of the class he or she seeks to represent at the time the class action is certified by the district court." *Sosna* v. *Iowa,* 419 U.S. 393, 403 (1974). Petitioners fail that test as to the Common Stock and Warrant classes. Moreover, it is hornbook law that a litigant:

> "has standing to seek redress for injuries done to him, but may not seek redress for injuries done to others." *Laird* v. *Tatum,* 408 U.S. 1, 14 (1972) quoting from *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 166 (1972).

Petitioners have not asserted that the Common Stock and Warrant classes were injured by the settlement or even that the settlement terms were unfair to them. On the con-

trary, as noted at the outset, petitioners expressly represented to the District Court that:

> They had no interest in the Common Stock settlement,
>
> They had no interest in the Warrant settlement, and that,
>
> Their only interest is in just a portion of the Debenture class who did not approve the settlement.

In justice, petitioners' concern is *de minimis,* compared to the nearly 32 million dollars which the other class members have at stake, and which might have to be surrendered if the writ were granted.

V. Petitioners' Constitutional Attack on the Rule 23 Opt-Out Provision and Their Demand for Specific Findings are Made Here for the First Time and May Not be Reviewed.

Petitioners make two statements here for the first time:

1. "the affirmative act of opting out . . . is unconstitutional (Pet. p. 19).
2. this Court should require in this case

   "specific findings of fact and Conclusions of law" (Pet. p. 17).

Neither argument was ever made before the District Court or the Court of Appeals. Petitioners do so here, for the first time, in an apparent attempt to bootstrap their common law contract claim onto a federal question custom made for the purpose. Both contentions, like all the rest, are the common law contract claim in another disguise. But we submit they must fall *ab initio* because they were never raised or considered below. *Duignan* v. *United States,* 274 U.S. 195, 200 (1926); *Lawn* v. *United States,* 355 U.S. 339, 362 n. 16 (1958); See also, *Youakim* v. *Miller,* 425 U.S. 231 (1976).

CONCLUSION

This appeal from a whole judgment, which deals with a part—and a part of a part at that—is puzzling to begin with. It becomes bewildering because it is apparent that the result Petitioners seek would mean:

> that no American corporation could consummate a cash merger without the written consent of each owner of Convertible Debentures, even where his contract permits such a merger.

It would mean:

> that this Court should determine that Congress, in writing the Securities Exchange Act of 1934 (whose 10b-5 jurisdiction is invoked here), and the legislatures of Delaware and New York, in adopting their corporate statutes, intended such a result.

And it would mean:

> that this Court must rewrite not only those federal and state statutes, but the common law and Federal Rule 23 as well.

The enormity of that proposition pales beside its twin: that the District Court must be reversed for failing to exercise the discretion which would have been required to make such landmark law, on its own.

Such a fantastic result would also require this Court to repeal that part of Rule 23 which permits settlements of class action litigation such as this, or to declare Rule 23 unconstitutional because it binds those who assert, but cannot prove, per se violations of law. For Petitioners are saying to this Court without ever citing any authority—that no convertible debenture owners (here or elsewhere) could ever be certified as a class, and their claims in this or any litigation could never be settled, without the express written consent of each and every one.

We submit that to state that proposition is to deny it!

On the Facts, on the Law and as a Matter of Public and Judicial Policy, the Petition Should be Denied.

Dated: New York, New York
September 19, 1977

Respectfully submitted,

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